QC 1 F2/3 4/22 DOCUMENTS

Volume 4, No. 22, Pages 7753 to 7880, October 23 - November 3, 1989.

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CC1.12/3:4/22

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WHBQ-TV) Memphis, Tennessee	**MM DOCKET NO. 84-1212** File No. BRCT-790402LC
For Renewal of License	
SOUTH JERSEY RADIO, INC. Memphis, Tennessee	**MM DOCKET NO. 84-1213** File No. BRCT-830511KE
NEW SOUTH MEDIA COMPANY Memphis, Tennessee	**MM DOCKET NO. 84-1214** File No. BPCT-830512KE
GREATER MEMPHIS COMMUNICATIONS, LTD.Memphis, Tennessee	**MM DOCKET NO. 84-1218** File No. BPCT-830512KI
RIVER CITY COMMUNICATIONS CORPORATION Memphis, Tennessee	**MM DOCKET NO. 84-1219** File No. BPCT-830512KJ
SHELBY BROADCASTING LIMITED PARTNERSHIP Memphis, Tennessee	**MM DOCKET NO. 84-1220** File No. BPCT-830512KL
MEMPHIS TELECASTERS, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1221** File No. BPCT-830512KM
COZZIN COMMUNICATIONS OF MEMPHIS, INC. Memphis, Tennessee	**MM DOCKET NO. 84-1222** File No. BPCT-830512KN
RIVER CITY BROADCASTING, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1224** File No. BPCT-830512KP
For Construction Permit for a New Television Station	

ORDER

Adopted: October 11, 1989; Released: October 27, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Pending before the Review Board are the Exceptions to the *Partial Initial Decision*, 2 FCC Rcd 4111 (1987)(P.I.D.), of Administrative Law Judge Richard L. Sippel (ALJ) filed on March 16, 1989 by South Jersey Radio, Inc.; New South Media Company; Greater Memphis Communications, Ltd.; River City Communications Corporation; Shelby Broadcasting Limited Partnership; Memphis Telecasters, Ltd.; Cozzin Communications of Memphis, Inc., and River City Broadcasting, Ltd., as well as various replies thereto and related pleadings.

2. In his P.I.D., the ALJ held that Memphis Telecasters, Ltd. lacked the basic qualifications to be a Commission licensee because its principal, H.A. Gilliam, Jr., had engaged in certain misconduct. P.I.D., *supra*, at 4131-34, 4135-37. However, on August 1, 1989, the parties filed with the Commission a Joint Petition for Approval of Settlement Agreement which is contingent upon, *inter alia*, a Commission determination that Gilliam's alleged misconduct would not affect his qualifications to be the licensee of other facilities. In their Joint Petition, the parties requested that the Board make this determination; however, the Commission has declared "it would be appropriate for us to do so as part of our review of the settlement," and directed the Board to certify to it the exceptions and replies relating to Gilliam. *Order*, FCC 89-279, released October 6, 1989, at paras. 9-10.

3. ACCORDINGLY, IT IS ORDERED, That the Exceptions and Replies relating to the qualifications of Memphis Telecasters, Ltd., and its principal, H.A. Gilliam, Jr., ARE HEREBY CERTIFIED to the Commission, as directed.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-442

In re Applications of

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT	File No. BPED-860624MC
SUN HEALTH CORPORATION	File No. BPED-870626MB
ARIZONA BOARD OF REGENTS FOR ARIZONA STATE UNIVERSITY	File No. BPED-870626MC
RADIO ALLIANCE PHOENIX	File No. BPED-870629NO

For Construction Permit for
New Noncommercial FM Broadcast
Station at Phoenix, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1989; Released: October 27, 1989

By the Review Board: MARINO(Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO issuing Separate Statement.

1. Before the Review Board are (1) an Appeal filed September 18, 1989 by Radio Alliance Phoenix (RAP), pursuant to Section 1.301(a)(1) of the Commission's Rules, 47 CFR §1.301(a)(1), from the *Memorandum Opinion and Order*, FCC 89M-2241, released September 11, 1989, of Administrative Law Judge Richard L. Sippel (ALJ) dismissing RAP's application from this proceeding; and (2) a Joint Opposition to that appeal filed by the remaining applicants on September 28, 1989.

BACKGROUND

2. In this proceeding, the Board is presented with a highly unusual situation. Until approximately August 30, 1989, RAP was represented (*pro bono*) by M. Fred Friedman, a Chicago, Illinois attorney. The ALJ established procedural dates for the forthcoming hearing by *Order*, FCC 88M-4240, released December 9, 1988. Therein, *inter alia*, the date for the exchange of hearing exhibits was set for August 28, 1989, and the hearing itself was scheduled to commence on September 18, 1989. In its Appeal, RAP claims that, "to the best of [its] knowledge," its hearing exhibits were being prepared to meet the exchange date. (Appeal, para. 2.) However, on August 30, 1989, RAP learned that its attorney "had not in fact exchanged those exhibits," but had prepared instead a "Motion for Stay" in which he asserted that "through no fault of RAP's" he had failed to adequately represent RAP, and that he would "be dead by the time you read this motion." (*Id.*) This stay motion was apparently served upon opposing counsel, but was not filed with the Commission.

3. Upon learning of Friedman's action, RAP claims that it promptly terminated his services; and, some four business days later (inclusive of the Labor Day weekend), it retained DeWitt Conklin as its new counsel. Conklin flew to Washington from San Francisco the very day he was retained (September 6, 1989), in order to appear on behalf of RAP at a scheduled prehearing conference the following morning.

4. However, another significant event occurred on September 6, 1989. On that date, RAP's opponents filed a "Motion to Dismiss" RAP's application based upon its failure to exchange the hearing exhibits as ordered. RAP's new counsel avers that "he had no idea" that this dismissal motion had been filed, and only learned of its filing upon his arrival in the courtroom in Washington, D. C. (Appeal, para. 5.) At the September 7 prehearing conference, the ALJ allowed RAP to present an oral "Motion for Stay," premised on the allegations contained in Friedman's originally drafted stay motion. [1] Additionally, the ALJ heard oral argument on the "Motion to Dismiss" filed by RAP's opponents only the day before. Thereafter, "[i]n a bench ruling, the Presiding Judge ordered the application of [RAP] dismissed with prejudice." *See* Order, at para. 2. The ALJ memoralized his "bench ruling" with the written *Order* under appeal.

5. In that *Order*, and in reflecting on Friedman's statement that he would "be dead by the time you read this motion," the ALJ stated:

> There was no medical evidence offered to show the clinical state of Mr. Friedman's mental health. Nor was there any affidavit or other proof of a Radio Alliance principal concerning when it became known that Mr. Friedman was not performing his duties as counsel.

(*Id.*, at para. 4). The ALJ further opined (*id.*, at paras. 5-7):

> While the record does not establish with certainty the date on which Radio Alliance learned of its problem with Mr. Friedman, by letter dated and mailed August 30, 1989, Radio Alliance's president, Ms. Clara Smith, advised the Commission that Mr. Friedman was "fired," that Radio Alliance was in the process of obtaining new counsel, and that Radio Alliance would "inform the Commission as soon as we have hired another lawyer." A copy of that letter was mailed to the Presiding Judge and was received by him on September 5, 1989. But that letter does not establish the mental condition of Mr. Friedman or the date (or time frame) that Radio Alliance principals knew that Mr. Friedman was not performing adequate legal services in furtherance of the application.

It is noted that one of the failures cited by the former counsel was the inadequate preparation of Ms. Smith for her deposition on June 12, 1989. Ms. Smith should have then realized that there was a problem. As a result of that deposition, Maricopa County filed a Motion To Enlarge Issues on August 22, 1989. No opposition was filed and as a result Radio Alliance would face added issues regarding control (real-party-in-interest), financial certification, financial ability, and related misrepresentations.

The above facts establish that Radio Alliance missed a critical procedural event by failing to exchange exhibits on August 28. There is no acceptable excuse offered and Radio Alliance has failed to show that counsel was medically incapable of preparing exhibits.

6. In its Appeal, RAP supplies the Board with a "Declaration" of its President, Clara Smith. There she claims (at paras. 2-3):

RAP was not aware of any problems with the legal representation being provided to it by Mr. Fred Friedman. Mr. Friedman had been our counsel throughout the hearing at the FCC. He had prepared us for our depositions and had represented us at the depositions. He had prepared court papers for filing at the FCC for us. As far as we were aware he was doing everything for us which needed to be done, and we had no reason to think otherwise.

On August 30, I learned that Mr. Friedman had not filed RAP's direct case exhibits which had been due on August 28. I also learned that he had, instead, prepared a pleading which mentioned that he was going to kill himself. That was the first time that we realized that Mr. Friedman might have a problem which was interfering with RAP's interests. I immediately decided to retain another attorney. I spoke with Affiliated Media Foundation Movement (AMFM), RAP's consultant, and asked them to attempt to locate another attorney to help us in the FCC hearing. AMFM put DeWitt Conklin in touch with me on September 6, and I hired him on behalf of RAP at that time.

7. RAP further argues that it should have been given an opportunity to file a pleading responsive to the September 6 "Motion to Dismiss" filed by its opponents, pursuant to Section 1.294(c)(3) of the Commission's Rules, 47 CFR §1.294(c)(3), in lieu of presenting an oral opposition at the prehearing conference. RAP claims (Appeal, para. 6):

Instead, undersigned counsel was effectively "blindsided," being forced to address arguments of which he was previously unaware, in a proceeding for which he had been retained less than 24 hours earlier, without opportunity to consult with his client and prepare a complete response. The error here is especially clear since the dismissal of RAP's application is based at least in part on the ALJ's perception that RAP failed to offer factual explanations. *E.g., MO & O* at 4. But RAP was not given a" reasonable opportunity to do so!

DISCUSSION

8. The Board has recently decided several appeals involving dismissals for failure to prosecute and/or to comply with ALJ rulings. *See , e. g., Albert E. Gary*, 4 FCC Rcd 4112 (Rev. Bd. 1989); *Mark A. Perry*, 4 FCC Rcd 6500 (Rev. Bd. 1989); *V. O. B. Incorporated*, FCC 89R-54, released September 7, 1989; *Carroll, Carroll & Rowland*, FCC 89R-58, released October 5, 1989. In each, we have weighed the delicts against the standards set forth in *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n. 6 (1986), *appeal dismissed mem. sub nom. Punta Ybel Communications, Ltd. v. FCC*, No. 86-1670 (D.C. Cir. 1988), in which the Commission noted:

We emphasize that we do not lightly affirm the dismissal of an application where, as here, the failures are those of counsel and not the applicant. Counsel is the applicant's agent, however, and the applicant is bound by counsel's actions. Thus, although it is counsel rather than applicants who generally appear before us in these matters, they do so on behalf of their applicants. Were we to excuse all failures of counsel, we would leave our ALJs with no power to control proceedings. This would severely hinder the efficiency of our proceedings, particularly those involving multiple parties, which in turn would be unfair to the other applicants and would delay service to the public.

And, we have further consulted the court's guidelines set forth in *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988): [2]

In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

9. In applying the foregoing factors in the case at bar, the scales must tip in favor of RAP. First, in light of the unique circumstances here presented, we believe that RAP should have been afforded an opportunity to respond formally to its opponent's September 6 "Motion to Dismiss," rather than being compelled to rely exclusively on its new counsel's next day oral presentation. Second, the declaration of Friedman attests to reasonable efforts to prosecute RAP's application. [3] Third, Friedman's representations that his demise was imminent, reflects clearly on his mental and physical capacity at the time. [4] Fourth, RAP's justification for failure to comply with the ALJ's order to exchange hearing exhibits on the scheduled date is thus reasonable. Fifth, the delict appears to be an isolated event, and not part of a pattern of dilatory conduct. Sixth, it appears that there was no "client knowledge" or complicity in the procedural failure. Seventh, RAP moved promptly to obtain new counsel. Eighth, "equitable considerations" here militate against absolute dismissal of RAP's application.

10. RAP's application will therefore be reinstated in this proceeding. Further, since RAP may yet be facing basic qualifying issues (*see Order*, para. 6), the ALJ should afford a reasonable time for RAP to respond to the Motion to Enlarge Issues filed on August 22, 1989 by Maricopa County Community College District. [5]

11. ACCORDINGLY, IT IS ORDERED, That the Appeal filed September 18, 1989 by Radio Alliance Phoenix IS GRANTED, and that its application (File No. BPED-870629NO) IS REINSTATED in this proceeding. [6]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] While both RAP and the ALJ have employed the term "stay," it is obvious that RAP was more properly seeking a continuance of procedural dates.

[2] In *Mark A. Perry*, *supra* (separate statement) it was suggested that "in synthesizing all of the court's reference points," applicant dismissals should be reviewed in light of the following factors:

> 1. Was the fatal dereliction merely an isolated event, or part of a pattern which disrupted the proceeding to the palpable prejudice of other applicants;
>
> 2. Was there client knowledge of, responsibility for, or complicity in the operative derelection(s);
>
> 3. On appeal of a dismissal, is the applicant represented by culpable counsel; and,
>
> 4. Are there other equitable considerations that might mitigate against absolute dismissal.

[3] Former counsel (in his Declaration attached to RAP's Appeal) claims that:

> "Since its application has been designated for hearing, RAP has diligently prosecuted its application. It has, among other things: (a) paid for my two trips to Washington, and for my travel to Phoenix; (b) arranged for publication of the public notice; (c) retained an expert to conduct a survey of the needs and interests of low to moderate income people; (d) retained an expert to examine the radiation hazard from its proposed tower site; (e) produced documents; (f) testified in a deposition; (g) purchased the transcripts of its testimony; (h) reviewed the transcripts of that testimony and signed the transcript; (i) contributed $750 toward a joint engineering study; (j) purchased tickets for Clara Smith and myself to attend the Hearing in this matter. [Also] on behalf of RAP, I: (a) prepared and filed an appearance; (b) attended various meetings with opposing counsel to discuss settlement and discovery; (c) filed a notice of publication; (d) prepared a motion for leave to amend (which was granted); (e) traveled from Chicago to Washington to attend two Prehearing Conferences; (f) prepared a Motion to Enlarge Issues (which was successful); (h) prepared a scope of issues in Non-Commercial Proceedings; (i) prepared and filed another motion for leave to amend; (j) traveled from Chicago to Phoenix to participate in depositions."

[4] Former counsel further declared:

> "I did intend to kill myself. After preparing the motion, I faxed it to local counsel asking that he file it and serve the presiding judge. Apparently, he did not file the motion. I then served the other parties and went to look for a gun to kill myself. When I could not locate a gun, I went to a drug store to purchase a poison that would kill me. Since I was not sure that anything I could purchase without a prescription would be lethal, I did not purchase anything. I then went home to sleep, thinking that I would kill myself tomorrow. Early the next morning, I received a phone call from local counsel asking whether I intended to kill myself. I said I did. He tried to talk me out of it. Eventually, he succeeded.

[5] If he has not already done so, Conklin should enter an appropriate Notice of Appearance of behalf of RAP. *See* 47 CFR §1.221(c).

[6] Because of computer problems involving the final printing of this *Order*, an advance copy was released to all parties and the presiding ALJ.

SEPARATE STATEMENT
OF
BOARD CHAIRMAN JOSEPH A. MARINO

In his dismissal order, the presiding ALJ reasoned that the applicant Radio Alliance was obliged "to monitor the progress of its counsel in the prosecution of its application" and that "there must be some exercise of supervision by the applicant to be sure that procedural deadlines are being met." FCC 89M-2241, at para. 7. The Commission's policymaking decision in *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), on which the ALJ relied, does support his general proposition.

Strict accountability, however, cannot be imposed upon Radio Alliance for the faults of its counsel given the bizarre and extenuating circumstances set out in the Board's opinion. A different case might have been presented if *specific notice* had been given (in the prehearing order or elsewhere) about the applicant's general duty to monitor counsel's conduct to insure that crucial dealines are met, not by counsel, but by the applicant. On balance, "the scales must tip in favor" of the applicant as the Board has concluded.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONWIDE MUTUAL INSURANCE COMPANY
AND EMPLOYEES INSURANCE OF WAUSAU
A MUTUAL COMPANY,
Complainant,
v. File No. E-89-34

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY
Defendant.

ORDER

Adopted: October 19, 1989; Released: October 25, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 25, 1988, Nationwide Mutual Insurance Company and Employee Insurance of Wausau A Mutual Company ("Nationwide and Wausau") filed the above-captioned formal complaint with the Commission alleging that American Telephone and Telegraph Company's ("AT&T's") 56 Kilobits per second ("Kbps") DATAPHONE @ Digital Service "DDS" rates were unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). The basis for complainant's claim was the allegation that AT&T's 56 Kbps DDS rates have been targeted to earn in excess of AT&T's overall authorized rate of return.

2. On November 30, 1988, AT&T filed its Answer to the complaint, denying all liability and asserting that its 56 Kbps DDS rates have at all times been just and reasonable. In addition, AT&T filed a Motion to Dismiss the complaint, on the ground that the complaint fails to state a valid cause of action. On December 13, 1988, Nationwide and Wausau filed both a Reply to AT&T's answer and an opposition to AT&T's motion to dismiss.

3. On October 6, 1989, Nationwide and Wausau filed a Motion to Withdraw Complaint and Terminate Proceeding, stating that they no longer desire to prosecute the complaint. Nationwide and Wausau state that withdrawal of the complaint and termination of the proceeding will affect no other party, and will serve the public interest by eliminating the need for further litigation. Nationwide and Wausau indicated in the motion that AT&T does not oppose its request.

4. On the basis of the statements contained in the motion, we conclude that there are no longer issues in controversy and that this proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Nationwide and Wausau's motion to withdraw the complaint is GRANTED, and that the above-referenced complaint proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Authorization of

AALERT PAGING COMPANY OF SALT LAKE CITY — File No. 21654-CD-P/L-01-84

For PLMS Station KNKC325, operating on frequency 454.625 MHz at Salt Lake City, Utah

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1989; Released: October 25, 1989

By the Chief, Mobile Services Division:

1. On January 7, 1984, Citizens Communications Services, Inc, currently operating as AAlert Paging Company of Salt Lake City (AAlert) was granted authority to construct and operate a two-way station on frequency 454.625 MHz near Salt Lake City, Utah. On March 19, 1987, David R. Williams, d/b/a Industrial Communications (Industrial), a licensee of several radio common carrier stations providing service to the Salt Lake City area, filed a Petition to Institute License Revocation Proceedings against AAlert. Responsive pleadings have been filed.

I. BACKGROUND AND CONTENTIONS

2. In its Petition, Industrial argues that AAlert is operating in violation of Section 22.501(b) of the Commission's rules because station KNKC325 does not provide two-way service and that its application for the above-captioned facility contained misrepresentations regarding its capability to provide such service. Additionally, Industrial asserts that AAlert "cannot legally" provide two-way service because it has not received the requisite authority from the Public Service Commission of Utah. Petition at 2. Finally, Industrial argues that AAlert should be ordered to cease and desist from operating its station as a "paging-only facility" and to show cause why its license should not be revoked. Petition at 4.

3. In opposition, AAlert avers that it applied to the Commission for authorization of a two-way service with the intent of complying with Section 22.501(b) and has complied with this rule. AAlert asserts that its mobile-to-mobile service meets the requirements of Section 22.501(b) of the rules. Furthermore, AAlert states that its mobile-to-mobile service is not interconnected with the landline telephone network. In these circumstances, AAlert argues, state certification is not required.

II. DISCUSSION

4. Based on our review of AAlert's application and the record in this matter, we conclude that AAlert is operating within the bounds of Section 22.501(b) of the Commission's rules[1] and that Industrial's Petition is without merit. First, AAlert's facility at Station KNKC325 has a separate receiving antenna,[2] which allows the station to provide mobile-to-mobile service on an automatic basis. Thus, without operator assistance, all mobile-to-mobile traffic on the system is relayed via a base station, sent in two directions, to and from the base station, and thereby occupies both of the paired two-way frequencies assigned to the station. We find that AAlert's mobile-to-mobile, non-interconnected service satisfies the concern raised by the Commission that providing paging service alone on two-way channels would "leave one-half of such channels unused." Public Notice, Mimeo No. 5785 "Requirements to Provide Paging on Two-Way Channels in Common Carrier Land Mobile Service" (July 15, 1986). In these circumstances, Industrial's claim that AAlert's application contains material misrepresentations is unfounded. AAlert applied to the Commission for authorization of a two-way frequency and offers a form of two-way service. Finally, as to the issue of state certification, AAlert certifies that it has been advised by the Utah Public Service Commission (PSC) that two-way service not interconnected with the landline telephone network does not require PSC certification. Industrial has submitted no evidence that PSC certification is, in fact, required.

III. ORDERING PARAGRAPH

5. Accordingly, IT IS ORDERED that the Petition to Institute License Revocation Proceedings filed by David R. Williams, d/b/a Industrial Communications against AAlert Paging Company of Salt Lake City IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.501(b) states, in pertinent part, that, "[For] assignment to common carriers for two-way public land mobile service. One-way public land mobile service may also be furnished, provided that two-way service is offered."

[2] This antenna was referenced in AAlert's original FCC Form 401 application for the frequency 454.625 MHz.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Illinois Bell Telephone
Company, et al.,
Complainants,

v. File No. E-88-73

American Telephone and
Telegraph Company,
Defendant.

and

Southwestern Bell Telephone
Company,
Complainant,

v. File No. E-88-118

American Telephone and
Telegraph Company,
Defendant.

and

The Bell Telephone Company of
Pennsylvania, et al.,
Complainants,

v. File No. E-88-120

American Telephone and
Telegraph Company,
Defendant.

and

New England Telephone and
Telegraph Company, et al.,
Complainants,

v. File No. E-88-119

American Telephone and
Telegraph Company,
Defendant.

and

American Telephone and
Telegraph Company,
Complainant,

v. File Nos. E-89-41 through E-89-61

Illinois Bell Telephone
Company, et al.,
Defendants.

and

Pacific Bell,
Complainant,

v. File No. E-89-62

American Telephone and
Telegraph Company,
Defendant.

and

American Telephone and
Telegraph Company,
Complainant,

v. File No. E-89-133

Southwestern Bell Telephone
Company,
Defendant.

ORDER

Adopted: October 13, 1989; Released: October 20, 1989

By the Commission:

1. The American Telephone and Telegraph Company (AT&T) and the captioned Bell Operating Companies (BOCs) filed petitions on July 13, 1989, asking us to reconsider our dismissal of their above-captioned formal complaints.[1] For the reasons set out below, we deny the petitions.

I. INTRODUCTION.

2. The complaints at issue here asserted claims that the parties described as contingent upon the outcome of the remand proceeding involving Special Access tariffs. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166, Phase I, FCC 86-52 (released January 24, 1986), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). The complaints asked for damages if, in the remand proceeding, the Commission were to find that Shared Network Facilities Agreements (SNFAs) and Special Access tariffs provide for "like" services and that any discrimination between SNFA and Special Access rates is unreasonable. Specifi-

cally, the BOCs alleged that were such findings to be made, AT&T would have failed properly to remit Special Access charges due under the applicable tariffs when it instead paid SNFA rates. AT&T, in its complaint, argued that given the same findings, the BOCs would have violated Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202, by providing AT&T with certain Special Access services at tariffed rates higher than SNFA rates.

3. Acting on BOC motions to dismiss and on our own motion, we dismissed both the BOC and the AT&T complaints. *See Illinois Bell Telephone Company, et al. v. American Telephone & Telegraph Co., et al.*, 4 FCC Rcd 5268 (1989) (" *Dismissal Order* "). In the case of the BOC complaints, we said, *inter alia*, that under Sections 206-209 of the Communications Act, 47 U.S.C. §§ 206-209, the BOCs, as carriers, could not file complaints against AT&T in its capacity as their customer. The BOC complaints, we explained, did not allege that AT&T had violated the Communications Act while acting as a carrier. Instead, the complaints were based on AT&T's actions as a customer, which are not subject to the complaint process established in §§ 206-209 of the Communications Act. Addressing the AT&T complaints, which AT&T expressly made contingent on the outcome of the remand proceeding, we first said that AT&T had failed to show that it could have been damaged as a result of any discrimination alleged under Section 202(a) in this proceeding. Second, we said that a finding of unlawful discrimination between SNFA and Special Access rates would not necessarily mean that the Special Access rates were excessive under Section 201(b).

II. DISCUSSION.

4. We have reviewed the BOCs' joint petition for reconsideration and AT&T's opposition. The petition, we find, fails to raise any persuasive argument to controvert our determination that the BOCs may not bring a complaint against AT&T in its capacity as a customer. The Commission decisions cited in the joint petition[2] are distinguishable from the instant case most notably in that the cited cases concern allegations that carriers failed to provide services pursuant to tariff rates and practices. Such allegations are properly the subject of complaints filed pursuant to 47 U.S.C. § 208, and our dismissal order did nothing more than affirm this principle by dismissing "complaints" that did not allege any violations by AT&T of its obligations as a carrier. Hence, we decline to disturb our original ruling.

5. We have also reviewed AT&T's petition and the oppositions thereto. The petition raises no new arguments that would cause us to alter the conclusion in our dismissal order. AT&T restates its contention that compensable discrimination against it occurred when it was charged different rates for SNFA and Special Access services. The mere fact that AT&T paid different rates for SNFA and Special Access cannot support a claim for damages under Section 202. As we stated in the dismissal order, a claim for discrimination does not lie simply because the complainant would have been better off if it had paid lower rates. [3] "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages." *ICC v. United States*, 289 U.S. 385, 389 (1933). Section 202 contemplates that the Commission would find compensable discrimination only if a similarly situated customer paid less for the same service and the complaining customer can show injury. AT&T has not demonstrated that it could have been injured as a result of any discrimination between SNFA and Special Access rates. Moreover, the record indicates that any discrimination under investigation in the remand proceeding would favor, rather than injure, AT&T.

6. In addition, AT&T challenges our characterization of its Section 201(b) claim as dependent on the presumed legality of SNFA rates. AT&T maintains that the legality of SNFA rates was not a necessary premise of its argument, and that its cause of action depends only on the illegality of the BOCs' Special Access rates. AT&T has simply reiterated the Section 201(b) argument we rejected in our dismissal order. It is AT&T's position that " *if* the Commission finds that the BOCs' Special Access rates are unlawfully discriminatory and orders the BOCs to cure that discrimination by reducing their Special Access rates, then the Special Access rates *a fortiori* are excessive . . ."[4] As we observed in our dismissal order, it does not follow, as a logical matter, that the Special Access rates are excessive within the meaning of Section 201 simply because there is a disparity between those rates and the SNFA rates.[5] Because just and reasonable rates are defined by a zone of reasonableness, two rates may be just and reasonable under Section 201 when viewed in isolation, yet unlawfully discriminatory under Section 202 if they result in two customers paying unjustifiably different rates for like services.[6]

III. CONCLUSION.

7. After considering the BOC and AT&T reconsideration petitions, we find that their complaints were properly dismissed under Section 1.728(a) of the Commission's Rules, 47 C.F.R. § 1.728(a), which states that "[a]ny document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed." We therefore see no reason to disturb the results of our prior decision.

IV. ORDERING CLAUSE.

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by the American Telephone and Telegraph Company on July 13, 1989, and the joint petition for reconsideration filed by the Bell Operating Companies on July 13, 1989, are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before us are also oppositions to the AT&T petition filed by U.S. West on behalf of its operating companies, Bell South on behalf of its operating companies, NYNEX on behalf of its operating companies, Pacific Telesis on behalf of its operating

companies, and the Southwestern Bell Telephone Company, along with AT&T's reply thereto; and AT&T's opposition to the BOCs' joint petition, along with the replies thereto.

[2] Referral of Questions from General Communication Incorporated v. Alascom, Inc., 3 FCC Rcd 700 (1988); RCA Global Communications v. Western Union Int'l, 86 FCC 2d 463 (1981).

[3] *See Dismissal Order*, 4 FCC Rcd at 5271 n.13.

[4] AT&T Petition for Reconsideration at 12.

[5] *See Dismissal Order*, 4 FCC Rcd at 5270 ("Findings by the FCC that there is an unlawful discrimination between [SNFA] rates and Special Access would not necessarily mean that the Special Access rates, 'viewed in isolation' are excessive -- even if the Commission should also find that the SNFA rates are just and reasonable.").

[6] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 6, 1989

PRIVATE RADIO BUREAU AND OFFICE OF ENGINEERING AND TECHNOLOGY ESTABLISH EX PARTE PROCEDURES FOR THE REGIONAL PUBLIC SAFETY PLANNING PROCESS

In December, 1987, the Commission adopted policies and procedures in Docket No. 87-112 that constitute a national plan for public safety radio services. Regional committees are now in the process of implementing this action by submitting specific plans for their regions. As these plans have been put out for public comment, interested parties have sought meetings and other opportunities for contact with Commission staff outside of the formal comment and reply comment process. By this Public Notice and under the provisions of our *ex parte* rules, we establish guidelines for such contact. *See* 47 C.F.R. § 1.1200(a).

For the most part, the regional plans put out for comment reflect a consensus by the public safety entities in the affected areas. Comments to date have therefore generally contained requests for clarification or further coordination rather than opposition. In these circumstances, the Bureaus believe that application of the *ex parte* rules for non-restricted proceedings is appropriate. *See* 47 C.F.R. § 1.1206. Application of these less restrictive rules will ensure that the Commission staff is able to obtain quickly and efficiently all necessary information before the plans are formally accepted.

If a plan is opposed, however, the proceeding will be treated as restricted. *See* 47 C.F.R. § 1.1208. The Commission will no longer entertain oral *ex parte* presentations regarding the plan. Any initial opposition to a plan and any subsequent communications relating to an opposed plan must be made in writing and will be placed in the public record of the proceeding by the Bureaus. Service on the parties will not be required, but the Bureaus will issue periodic public notices of any such written *ex parte* presentations. If the Bureaus determine that a regional plan has been opposed, and that oral *ex parte* presentations are therefore not permitted, they will issue a public notice to that effect.

For further information contact Myra G. Kovey at (202)632-6497 or Bob Ungar at (202)653-8100.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 20, 1989

PRIVATE RADIO BUREAU REQUESTS COMMENTS ON MILLICOM RADIO TELEPHONE COMPANY, INC.'S REQUEST FOR WAIVER AND OTHER RELIEF TO PERMIT CONSTRUCTION OF A NATIONWIDE TWO-WAY MOBILE DATA AND VOICE COMMUNICATIONS NETWORK IN THE 900 MHZ SPECTRUM

On August 23, 1989, Millicom Radio Telephone Company, Inc. (MRTC) filed a proposal and request for waivers and other relief with the Commission to construct a nationwide two-way mobile data and voice communications network using the 900 MHz SMR frequencies. MRTC filed additional information regarding the proposed network on September 22, 1989 and October 18, 1989. The proposal and supplements are available for public inspection. Interested parties are invited to review the proposal and make comments on any aspect of it. Comments should be filed no later than 15 days from the date of this notice. Replies should be filed no later than 5 days from the last day of the comment period. Comments and replies should refer to reference number LTR-205.

Copies of the Millicom Radio Telephone Company, Inc.'s filing may be obtained from International Transcription Services, 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. A copy is also available for public inspection in Room 5202, 2025 M Street, N.W., Washington, D.C. 20554.

For further information contact Terry J. Romine at (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-211

In re Applications of

J.T. PARKER BROADCASTING CORP. File No. BPH-861001TB

YEARY BROADCASTING, INC. File No. BPH-861001TC

For a Construction Permit
for a New FM Station at
Lebanon, Virginia

Appearances

Julian P. Freret, on behalf of J. T. Parker Broadcasting Corp.; and *John R. Wilner*, on behalf of Yeary Broadcasting, Inc.

DECISION

Adopted: October 18, 1989 **Released: October 27, 1989**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. This proceeding now involves the two remaining applicants for a new Class A FM facility at Lebanon, Virginia. Before the Review Board are the *Initial Decision*, 4 FCC Rcd 5729 (1989)(I.D.), of Administrative Law Judge Joseph Chachkin (ALJ), as well as the exceptions of J.T. Parker Broadcasting Corp. (Parker), and the reply thereto filed by Yeary Broadcasting, Inc. (Yeary). Neither party has requested oral argument. Based upon our review of the pleadings and the hearing record below, we affirm the ALJ and hold that Yeary is the comparatively preferred applicant.

2. By *Hearing Designation Order*, 3 FCC Rcd 2733 (1988)(HDO), the captioned applicants (along with one other subsequently dismissed) were designated for hearing on the standard comparative issue (including consideration of the "comparative coverage" of the respective applicants). With respect to areas and populations to be served, the ALJ determined that neither Yeary nor Parker was entitled to a preference (I.D., para. 25). Neither party has excepted to this conclusion.

3. With regard to Yeary's integration proposal, the ALJ awarded that applicant 100% quantitative credit for the full-time participation of its sole shareholder, D. Lanis Yeary. That credit was enhanced by his local residence within the proposed station's service area, his civic activities, and his prior broadcast experience (I.D., paras. 31, 33). Parker has not excepted to these awards. Indeed, Parker's exceptions are confined to: (1) the ALJ's assessment of a "diversification" demerit against it; (2) the ALJ's rejection of Parker's claim to a "daytimer's preference" for its ownership of co- located WLRV(AM); and (3) the failure to award J.T. Parker, Jr. (Parker's President) full-time "integration" credit.

4. In considering the "diversification" aspects of both applicants, as mandated by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the ALJ concluded (I.D., paras. 26-27):

> In the instant proceeding, Parker owns a daytime-only AM station (WLRV) in the community to be served. Parker had two opportunities to avoid suffering a diversification demerit for ownership of that facility. Parker missed both opportunities. First, Parker failed to make a timely "B" cut-off date divestiture commitment. Second, as a licensee of a daytime only AM station in the FM community, Parker could have avoided a diversification demerit by making a divestiture pledge within 30 days after designation of its FM application for hearing. Parker failed to meet this deadline and its untimely diversification commitment was stricken. [*Memorandum Opinion and Order*], released October 3, 1988. In addition, J.T. Parker, Jr., the applicant's 60% owner, also owns 100% of the full-time AM station licensed to a city located some 40 miles from Lebanon and 60% of another daytime- only AM station located in Newland, North Carolina, approximately 60 miles from Lebanon. W.M. Sandidge, a 20% owner of the applicant, also owns 20% of the Newland, North Carolina station.
>
> In contrast to the multiple broadcast station holdings of Parker and its owners, Yeary is the licensee of a single broadcast facility, daytime-only Station WSPC, St. Paul, Virginia, which is located some 10-15 miles from Lebanon. Although WSPC provides primary coverage to Lebanon and [Yeary] sells advertising time in that community, there is a clear comparative distinction between [Yeary's] lone broadcast interest and the interests of Parker in Lebanon and other reasonably proximate radio markets. In sum, [Yeary] warrants a moderate diversification preference over Parker in this proceeding.

5. Anent Parker's claim to a "daytimer preference," it is recalled that on April 12, 1985 (approximately 17 months prior to the time Parker filed its application), in its *Second Report and Order* (*Implementation of BC Docket No. 80 - 90 to Increase the Availability of FM Broadcast Assignments)*, 101 FCC 2d 638 (1985) (" *Second Report and Order* "), *on reconsideration*, 59 RR 2d 1221 (1986), *further recon. denied*, 2 FCC Rcd 481 (1987), *aff'd sub nom. National Black Media Coalition v. FCC*, 822 F.2d 277 (2nd Cir. 1987), the Commission declared the public interest to encompass a comparative preference to daytime-only AM licensees who apply for new FM channels in their community of license. In so doing, it announced:

> We believe that affording comparative credit to daytime only licensees who apply for new FM channels in their community of license also increases the likelihood of securing the best practicable service . . . . Moreover, awarding special comparative consid-

> eration to daytimers serves as an incentive to licensees in general that operation of facilities in the public interest, notwithstanding the difficulties encountered, can lead to certain added benefits. In view of the foregoing, we have decided to consider prior daytime ownership/management experience in an upgraded manner under the general comparative criterion of securing the best practicable service. Specifically, where the broadcast experience of an applicant is based on previous substantial participation in management of a daytime-only station owned by the applicant in the same community as the proposed FM station, we shall upgrade the value of broadcast experience as an integration enhancement so that it will be equal to the enhancement value of local residence or minority ownership. . . .
>
> However, to receive any such additional credit, *the daytime - only licensee / applicant must have owned the daytime - only station for three continuous years prior to designation of the FM application for hearing. The applicant also must propose to be integrated in the operation of the FM station. In addition, the application must be for an FM channel in the same community as the daytime - only station's community of license.* . . . [Further] daytimer's who choose to take advantage of the upgraded comparative credit for daytime-only ownership/broadcast experience, *should be required to divest themselves of the daytime - only station.* . . . Given the above, a daytimer seeking additional comparative credit *must pledge to divest itself of the daytime - only station within three years from the commencement date of the program test authorization* for the new FM station. *This divestiture pledge must be made by the daytimer within 30 days after designation of its FM application for hearing.*

101 FCC 2d at 645-646 (footnotes omitted; emphasis added). In this proceeding, the HDO was released on May 12, 1988; hence, pursuant to the foregoing conditions, Parker was required to pledge divestiture of its daytime-only station, WLRV(AM), on or before June 13, 1988. It is uncontroverted that Parker did not so pledge in a timely fashion.

6. Nevertheless, Parker argues that "mitigating circumstances and the public interest" should permit it to claim the "daytimer preference. More specifically, Parker asserts that it was not represented by counsel "until immediately preceding the deadline for filing Notices of Appearance," and that its "lack of understanding" of the Commission's rules and precedent must be considered. Parker further argues that while its principal is an experienced broadcaster, he is "inexperienced in legal matters." (Exceptions, at para. 21.)

7. Yeary replies that Parker was represented by the same counsel in several other FCC matters prior to release of the HDO in this proceeding, and, Yeary argues, in any event, it is clear that "a party who has elected to proceed without counsel is not relieved of its burden to become familiar with, and conform to, the Commission's procedural rules," citing *Classic Vision, Inc.*, 1 FCC Rcd 1109, 1110 n. 2 (Rev. Bd. 1986). Additionally, Yeary observes that Parker's counsel had, in fact, entered its appearance some three weeks *prior* to the deadline for declaring for the "daytimer preference." (Reply, at paras. 14-15).

8. We hold that the ALJ did not err in striking Parker's late claim to a "daytimer preference." Parker admits its untimeliness under the deadline set in the *Second Report and Order*, and has not offered any legal or equitable explanation therefor (even assuming, *arguendo, Board's authorization to waive that deadline). Thus, Parker's exceptions in this regard must fail.*

9. In its further quest to avoid attribution of WLRV(AM), Parker argues that if it is not entitled to a "daytimer preference," it should, at a minimum, be credited with its promise to divest WLRV(AM). Parker notes that it did represent that, "upon grant of the Lebanon FM application . . . [it] will divest WLRV in accord with Commission rules and policies." However, the first time that Parker made this representation was in its "Integration and Diversification Statement" filed June 23, 1988, in response to the ALJ's *Order Prior to Prehearing Conference*, FCC 88M-1830, released June 15, 1988, well after the "B cut-off" date, and well after its application had been designated for consolidated hearing.

10. While essentially conceding that this divestiture pledge was untimely, Parker interposes the same mitigating factors iterated in paragraph 6, *supra*, but adds the argument that the application form (FCC Form 301) utilized "does not contain any questions on divestiture plans of the applicant." (Exceptions, at para. 21). Relying on *Barton Broadcasting Co.*, 104 FCC 2d 785, 789 (Rev. Bd. 1986)(divestiture commitment of weekly newspaper in integration statement filed subsequent to "B cut-off" date recognized), Parker argues that it was not required to pledge divestiture of WLRV(AM) prior to the filing of its "integration" exhibit.

11. It is well-established that an applicant can avoid comparative attribution of an extant media interest if, before the specified "B cut- off" date, it affirmatively pledges to divest upon grant of the new application. *Washington's Christian Television Outreach, Inc.*, 59 RR 2d 787, 790 (1985), *recon. denied*, 59 RR 2d 1679 (1986), *aff'd by judgment*, No. 85-1649 (D.C. Cir. Dec. 17, 1987); *see also Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794-796 (Rev.Bd. 1984), *aff'd in principal part sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 734 (1986), *aff'd by judgment sub nom. Plantation Broadcasting Corp. v. FCC*, Case No. 86-1060 (D.C. Cir. March 17, 1987). Without such a timely divestiture pledge, even an actual divestiture made after the "B cut-off" date must be disregarded for comparative purposes, in order to prevent unfairness to competing applicants that would come of "comparative upgrading." *See Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 215-219, 223 (Rev. Bd. 1984), *aff'd in pertinent part*,101 FCC 2d 1010, 1012-1013 (1985), *modified*, FCC 86-182, released April 18, 1986; *Martin Intermart, Inc.*, 3 FCC Rcd 1650, 1652 (Rev. Bd. 1988).

12. There is no dispute here that Parker's pledge to divest was made far too late in the proceeding to be credited. As to Parker's reliance on *Barton Broadcasting Co.*, where the Board did recognize a post-"B cut-off" divestiture commitment of a weekly newspaper (since revised FCC Form 301 did not require disclosure of such a media interest), it was specifically noted that "because [revised FCC Form 301] requires [specific disclosure of ownership of other broadcast facilities], pledges to divest . . . other *broadcast* interests must still be made by the "B" cut-off date." 104 FCC 2d at 789 (emphasis added). Parker claims no confusion arising out of the language of its

application form, and *Barton* holds directly contrary to Parker's position. Parker's divestiture claim cannot be credited here.

13. Inasmuch as diversification of media interests "is a factor of primary significance," and "a primary objective" in the Commission's licensing scheme, "[o]ther interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area . . . ." *Policy Statement,* 1 FCC 2d at 394. As we have confirmed, WRLV(AM), licensed to the same community for which the FM construction permit is here sought, must be attributed to Parker, and his same-community media interest (coupled with his ownership interests in two additional facilities in North Carolina and Tennessee), [1] must weigh more heavily than Yeary's sole non-community facility. Thus, we concur with the ALJ that there is a "clear comparative distinction" between Parker's and Yeary's proposals, and Yeary is the preferred applicant under the diversification criterion.

14. Yeary's comparative posture is also enhanced by virtue of a clear integration preference. As noted above, Parker has not excepted to the ALJ's award of 100% integration credit to Yeary's sole owner and President, enhanced by that principal's long-term residence within the 60 dBu contour of its proposed facility, civic activities, and broadcast experience. Thus, even if we were to consider Parker's exceptions as to the ALJ's failure to award its 60% owner-principal with 100% integration credit, Parker could not prevail in this proceeding because Yeary is preferred under both the integration and diversification criteria. [2]

15. ACCORDINGLY, IT IS ORDERED, that the application of J. T. Parker Broadcasting Corp. (File No. BPH-861001TB) IS DENIED; and the application of Yeary Broadcasting, Inc. (File No. BPH-861001TC), IS GRANTED. [3]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The applicant corporation here is the licensee of WLRV(AM), Lebanon, Tennessee. J.T. Parker Broadcasting Corporation, a North Carolina corporation, is the licensee of WJTP(AM), Newland, North Carolina, and consists of the same principals, with the same ownership interests, as the applicant here. J.T. Parker, Jr., is the 100% owner of a corporate licensee which operates WJTZ(AM), Blountville, Tennessee.

[2] The awarding of 100% integration credit to J.T. Parker, Jr. would translate to no more than a net 80% integration credit to Parker Broadcasting because Mr. Parker owns 60% of the stock of the corporate applicant, and the only other proposed integrated principal has a 20% ownership interest. *See Miracle Strip Communications, Inc.,* 4 FCC Rcd 5064, 5066 (1989)(12.5% difference in integration held to be "clear quantitative difference").

[3] Because of computer problems involved in the final printing of this document, the parties are being furnished advance copies.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-342

In re Applications of

OCEAN PINES LPB BROADCAST CORP.	File No. BPH-870406KF
Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a) OCEAN PINES BROADCASTING COMPANY	File No. BPH-870406KH
THE JOHNS HOPKINS BROADCASTING FOUNDATION	File No. BPH-870406MA

For a Construction Permit for a
New FM Station on Channel 246A
in Ocean Pines, Maryland

Appearances

Robert E. Levine on behalf of Ocean Pines LPB Broadcast Corp.; *Henry A. Solomon* on behalf of Malcolm Kahn, George B. Delson, Allen Skolnick & Saul Hertzig d/b/a Ocean Pines Broadcasting Company; *Ernest T. Sanchez, Gerald Stevens - Kittner* on behalf of The Johns Hopkins Broadcasting Foundation; and *Jerry Hermele* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: October 18, 1989; Released: October 26, 1989

1. The three applications in the caption and seven others, now dismissed, were designated for a comparative hearing on June 24, 1988 (released August 3, 1988). *Stegus Corporation*, 3 FCC Rcd 4641 (1988). The following issues and various filings made after the close of the record will be considered in this decision:

1. To determine whether the findings and conclusions about the conduct of Leonard P. Berger, as a real-party-in interest in *Key Broadcasting Corporation*, 3 FCC Rcd 6587 (ALJ 1988), should disqualify Ocean Pines LPB Broadcast Corp.

2. To determine whether Ocean Pines LPB Broadcast Corp.'s application violates §73.3518 and should be dismissed.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on October 6, 1988 (Tr. 1-9). Written testimony was exchanged on March 27, 1989 and hearing sessions were held on April 17 (Tr. 10-48) and April 18, 1989 (Tr. 49-106). The record was closed on April 18, 1989. *Order*, FCC 89M-1226, released April 20, 1989. Proposed findings and conclusions were filed on June 13, 1989 by the applicants and the Bureau and replies were filed by the applicants on July 6, 1989.

FILINGS REGARDING CONTROL OF JOHNS HOPKINS FOLLOWING THE CLOSE OF THE RECORD

3. The following related pleadings will be considered in this section: Motion for Leave to Amend, filed July 14, 1989 by The Johns Hopkins Broadcasting Foundation; Motion to Dismiss [Johns Hopkins] Application, filed July 26, 1989 by Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a Ocean Pines Broadcasting Company; Motion to Enlarge Issues [against Johns Hopkins], filed July 27, 1989 by Ocean Pines LPB Broadcast Corp.; and Motion to Dismiss, filed July 27, 1989 by Ocean Pines LPB Broadcast Corp.

Johns Hopkins' July 14, 1989 Amendment

4. Johns Hopkins (or Foundation herein) petitions for leave to amend to report that all of its officers and directors have been replaced. Johns Hopkins represents that directors, officers, and board members, Richard P. Longaker and Robert C. Bowle, were replaced by John V. Lombardi and John J. Lordan in June and July 1987. The third director and president of the Foundation, Barbara J. Norris, was replaced by Eugene S. Sunshine, on July 5, 1989. Johns Hopkins urges as good cause for granting its petition and accepting the amendment as follows: It concedes that it does not meet the due diligence test since two-thirds of its officers and directors were replaced before the applications were designated for hearing, over two years ago. Johns Hopkins claims as "mitigation" for its lack of diligence that the Johns Hopkins Broadcasting Foundation is a subsidiary of The Johns Hopkins University (herein University); that Richard P. Longaker and Robert C. Bowle were replaced because they have severed their "administrative duties" with the university; that Barbara J. Norris was replaced because she also no longer had an administrative role at the University. Johns Hopkins argues that its officers and directors have "no impact on any of the comparative issues designated in this proceeding" and maintains that the officers and directors are irrelevant to its proposal. It urges that its "noncommercial nature" makes changes in its directors and officers "far less significant from the standpoint of whether a transfer of control has taken place than would a similar change in a commercial entity." Johns Hopkins argues that, in any event, it believes there are "no clear guidelines" governing a transfer of control and, therefore, it was not under any obligation to obtain Commission approval before changing all of its officers and directors.

5. Johns Hopkins concedes that it did not report the change in control when it occurred and, in addition, concedes that the identity of the officers and directors in its hearing exhibits, filed March 27, 1989 was inaccurate. Johns Hopkins claims that its lack of diligence was due to miscommunication and lack of oversight rather than careless disregard. It asserts that it "technically" violated §1.65 and §73.3522 of the rules but that its failure to report the changes was not disruptive, will not prejudice the other parties and will not require the addition of new parties or new issues.

6. In opposing acceptance of the amendment, Kahn points out that Johns Hopkins president, Barbara J. Norris, signed the application and she sponsored the hearing exhibits filed March 27, 1989. Nevertheless, Kahn explains, she did not identify the changes in the directors and officers in the hearing exhibits and, moreover, she represented they were the same. In the application she did not report the claimed interest of the University. In addition, as Kahn states, Johns Hopkins filed, on October 18, 1988, a statement about its proposal which also failed to identify who governed or controlled. These post-designation filings, which were filed over a period of many months, Kahn maintains, contained inaccurate representations or material omissions about Johns Hopkins' proposal. Kahn urges that Johns Hopkins has not supported its assertion that it was diligent because of "miscommunication and oversight." Kahn states that Johns Hopkins has not, moreover, filed a statement from anyone who has first-hand knowledge of the reasons asserted. In responding to Johns Hopkins' self-serving claim that the changes would have become known if the competing parties had initiated discovery about Johns Hopkins' proposal, Kahn claims it did not undertake discovery because it believed Barbara Norris' representations were accurate. It now would like to initiate discovery on Johns Hopkins' proposal.

7. LPB opposes granting the amendment because Johns Hopkins has not met five of the six elements of the good cause test. LPB urges that Johns Hopkins has not justified its admitted failure to file the amendment for two years. In that regard, LPB maintains that Johns Hopkins' assertion that it is a "subsidiary" of The Johns Hopkins University is not a claim previously made nor indicated on the record. and that Johns Hopkins had numerous chances to review who its principals were when it made required filings during the intervening two years but it did not do so. LPB also urges that an issue may be necessary to determine whether Johns Hopkins' application should be dismissed, whether it should be disqualified for violating §1.65, and whether it misrepresented who controlled the applicant.

Kahn and LPB's Motions to Dismiss Johns Hopkins

8. Kahn urges that Johns Hopkins' replacement of two of three directors requires that a new file number be assigned pursuant to §73.3573(b). That rule, Kahn states, applies when 50% of the ownership changes from the application as originally filed. Kahn argues that in nonprofit, noncommercial entities directors are treated as owners. In addition, LPB, which makes the same arguments as Kahn, points out that the Commission in *Tequesta Television, Inc.*, 2 FCC Rcd 41 (1987) held that a 50% change in control required the assignment of a new file number.

9. Johns Hopkins opposes the motions to dismiss on the grounds that the Commission has not stated clearly what circumstances constitute a transfer of control for nonprofit entities which requires the Commission's consent. *Citing, Seven Locks Broadcasting Co.*, 94 F.C.C. 2d 899 (1983). It urges that the Commission's treatment of directors of nonprofit corporations as owners is a policy applied only for comparative purposes. Johns Hopkins University Provost and Vice President for Academic Affairs, Dr. John V. Lombardi, who is also an officer and director of the applicant, states that it is his "understanding" that the person who occupies his university position also becomes an officer and director of the Foundation. He claims that the other directors and officers of the Foundation were selected because of their administrative positions at the University. He represents that the Foundation was established to support the goals and objectives of the University. In addition, the Foundation claims that it reported to the Commission that it is a "close affiliate" of the University when it indicated the employment of its officers and directors and conceded that the University's radio station was an interest attributable to the Foundation for comparative purposes.

10. LPB and Kahn reply to Johns Hopkins' reliance on the Commission's holding in *Seven Locks Broadcasting Co.*, 94 F.C.C. 2d 899 (1983) by urging that the equitable principle applied by the Commission in that case is distinguishable from the facts presented in this one. Unlike Johns Hopkins' changes, they claim, that, in *Seven Locks*, four of the seven deacons of the Christ Church of Washington, which owned Seven Locks, changed over a complete license period while Johns Hopkins' majority (2 out of 3) changed abruptly. LPB and Kahn also urge that the equities are different because Seven Locks reported the changes in its yearly ownership reports while Johns Hopkins failed to reveal the changes in its integration statement and in its testimony at the hearing, which was signed by its then only president and director. In its testimony, they explain, Johns Hopkins misrepresented to the Commission that the directors were the same as when the application was filed. LPB urges that Dr. Lombardi's statement fails to identify who controls Johns Hopkins and how control is attributed. In LPB's view, the change in Johns Hopkins' officers and directors does not raise the special circumstances presented when there are gradual changes in a nonprofit board. The Johns Hopkins directors abruptly changed and they appear to control. LPB and Kahn argue that the Communications Act requires that if Johns Hopkins were a licensee, it would need to request that the Commission approve its change in ownership. Accordingly, they urge that, pursuant to §73.3573(b), its application should be dismissed.

LPB's Motion to Enlarge Against Johns Hopkins

11. LPB petitions to enlarge issues against Johns Hopkins to determine whether Johns Hopkins' change in ownership is a major change pursuant to §73.3573(b) and is a change in control which requires dismissing its application; to determine whether Johns Hopkins violated §1.65 and lacked candor in failing to report for two years the change in control; and to determine whether Johns Hopkins willfully misrepresented who controls its corporation and whether it should be disqualified.

12. LPB states in support of its request for dismissal that Johns Hopkins has not established that anyone but its officers and directors control, and that since all of them

have changed, the application has undergone a "major change" in 50% of its control. Therefore, it urges that Johns Hopkins' application should be assigned a new file number pursuant to §73.3573(b). In addition, LPB argues that Johns Hopkins' failure to report the change in its ownership for over two years violated §1.65 and that it concealed the changes in order to avoid disqualification. LPB also asserts that when Johns Hopkins reported that persons long-replaced were in control, it engaged in a misrepresentation.

13. Johns Hopkins, in its opposition to LPB's motion, makes the same arguments that it did in responding to the motions to dismiss. It urges that it did not conceal the changes deliberately or it would not have reported them when it did. It claims that it failed to report the changes because of "miscommunication and inadvertence." Johns Hopkins' lawyer, Frederick G. Savage, who is associate general counsel with The Johns Hopkins University, states that he advised the Foundation Board in 1987 that since two board members were changing their administrative positions with Johns Hopkins University, new board members should be named to replace them at the Foundation. Mr. Savage states he believed the needed change was "inherent in the Foundation's function and purposes." He claims he did not know that the changes should be reported and he cites, as justification for not knowing the fact, that he "had no direct contact with FCC counsel." When the president of the Foundation was replaced in June, 1989, Mr. Savage claims, he discussed it with FCC counsel (he does not explain how he then did have contact with FCC counsel) and was told the changes had to be reported. Johns Hopkins argues that, in any event, its failure to report the changes is a "technical difficulty." It offers no explanation for how it reported, in documents signed by its president, the names of officers and directors that had been replaced over two years before.

14. LPB replies to Johns Hopkins' argument that the University controls its activities by pointing out that the Foundation did not list the University as a party or an entity that could exercise control in its application, even though the form specifically asked for that information. LPB maintains that, if there was an understanding between the University and the Foundation about control then that understanding had to be reported.

Comments on Johns Hopkins' Corporate Documents

15. After a preliminary review of the foregoing pleadings, Johns Hopkins was asked to provide the Commission and the parties with its governing documents. Johns Hopkins produced to the parties and the Commission its Articles of Incorporation, By-laws, and the agenda and minutes of its organizational meeting. The parties were then given an opportunity to address how the documents support or detract from the various arguments made in the filings regarding the motions to dismiss, petition for leave to amend, and motion to enlarge. *Order*, FCC 89M-2157, released August 25, 1989.

16. LPB urges that the corporate documents place full control with the self-perpetuating board of Johns Hopkins. It points out that no mention is made that the Foundation has any relationship with The Johns Hopkins University. LPB urges that there is no support in the corporate documents for Johns Hopkins' claim that it is a subsidiary of the University or that the directors and officers are appointed by virtue of their administrative positions with the University.

17. LPB explains that Johns Hopkins' by-laws provide that the property and business of the corporation will be managed by the board of directors and that the by-laws give the directors the power to fill board vacancies, designate committees, including the nominating committee for board members, and the power to elect and remove officers. In addition, the by-laws provide that the president of the Foundation has general charge and control of all business affairs and properties. The board of directors have the power to designate who has the authority to deposit and withdraw funds and make loans on behalf of the applicant. Moreover, the board has the sole authority to amend, alter or repeal its by-laws. Johns Hopkins can have members who vote but those members are appointed by the directors and all directors are members. If the board appoints no other members, as is the case, then the only members are the directors. There is, LPB argues, no mention in the corporate documents that The Johns Hopkins University has any control or voice in the operation of the applicant.

18. LPB also points out that the minutes of Johns Hopkins reveal that two new board members were nominated by its president on June 12, 1987, not June and July 1987, as Johns Hopkins represented to the Commission in its amendment. Kahn makes essentially the same observations about Johns Hopkins' corporate documents as did LPB. Kahn also notes that there is no substantiation in the corporate documents for Johns Hopkins' claim that its directors are required to hold administrative positions with The Johns Hopkins University.

19. Johns Hopkins argues that its articles and by-laws are "typical non-profit incorporating documents." It urges that the documents establish the University's control because the articles provide that the Foundation's principal office will be The Johns Hopkins University and the registered agent for the Foundation is to be the University's general counsel. Johns Hopkins also maintains that, pursuant to the seventh article of incorporation, if it were dissolved, all its assets would go to The Johns Hopkins University. Article seven states that, upon dissolution, the assets would be distributed to "any other charitable organization" (defined as corporations, trust funds, foundations or community chest organized in the United States) "having a similar or analogous character or purpose, in some way associated with or connected with the corporation." The purposes of the corporation are charitable and educational according to the third article.

20. Johns Hopkins states that its name (The Johns Hopkins Broadcasting Foundation, Inc.) shows that it is affiliated with the Johns Hopkins University. It also urges that the University's control can be seen in the fact that its president used her University stationery to keep the minutes and, because the minutes exhibit the directors' intention to consult the University's broadcast station director and legal counsel about a broadcast application for Hurlock, Maryland.

Discussion

21. The 100% change in the Johns Hopkins Broadcasting Foundation Board of Directors raises a question about whether it is essentially a new applicant and whether its lack of diligence and inaccurate submissions indicate that Johns Hopkins would be an unreliable and untruthful

licensee. Johns Hopkins is a nonprofit, noncommercial corporation. On June 12, 1987, two of the three members, directors and officers of Johns Hopkins were replaced. The third member, the president, was replaced on July 5, 1989. While two-thirds of the board was different in 1987, Johns Hopkins did not tell the Commission. Instead, on October 18, 1988, when Johns Hopkins was asked to provide a statement about the composition of the applicant, it failed to inform the Commission about the changes in its makeup. On March 27, 1989, when it exchanged its written testimony, Barbara J. Norris, the president, declared under penality of perjury, that Richard Longaker and Robert C. Bowie were officers and directors of Johns Hopkins. Both Bowie and Longaker had been replaced in June, 1987.

22. Johns Hopkins, if it had filed the information on time in 1987, would have been subject to §73.3573(b) which provides that "where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed," a new file number will be assigned. Johns Hopkins is a nonprofit corporation which is directed not by owners but by members and directors. At all times the directors are members and, thus far, there have not been more members than directors. While each have voting rights, the difference has not been important in directing Johns Hopkins because members and directors have been synonymous. When two members of the board changed, the minutes of the corporation reflect that the president nominated two new members, on June 12, 1987. At that time, more than 50% of the ownership or control changed.

23. After the fact, when Johns Hopkins notified the Commission in July 1989 that all its directors, members and officers had changed, it urged, in the face of claims that it had transferred control, that control did not rest with its directors but that, in effect, permanent control was with The Johns Hopkins University and that the directors, officers, and members were essentially surrogates for the University. Johns Hopkins argues that its directors, officers, and members are always administrators of the University and their tenure as directors, officers and members is to last as long as they are administrators for the University. Johns Hopkins asserts that the University controls the applicant.

24. The record reflects that there is a relationship between the University and the applicant but it does not support the claim that control rests with the University. The corporate documents permit the board and its members to perpetuate itself. There is no provision in the by-laws or the articles of incorporation which allows The Johns Hopkins University to appoint members, officers, or directors of The Johns Hopkins Broadcasting Foundation, Inc. The claim that directors and officers must be from the administrative staff of the University is not provided for explicitly or implicitly in the corporate documents. Moreover, when the Commission specifically asked in the application form whether control or ownership interests could be exercised by persons or entities other than the applicant, Johns Hopkins did not identify any. Its claim about University's control of the Foundation was first made in response to the pending pleadings, but the claims are not verified in any of the usual legal documents that serve notice to outsiders about who controls the corporation. Unlike an existing licensee that has operated a facility, the Foundation has no ongoing business and no day-to-day activities that might objectively demonstrate, aside from the legal documents, how the corporation is controlled.

25. Those elements in the corporate documents which Johns Hopkins relies on for its argument that the University controls the Foundation do not support its claim. The Johns Hopkins University has apparently provided legal advice to the applicant. In addition, the documents governing the applicant make the University's general counsel its registered agent and the University is designated as the applicant's principal office. These elements do not permit the University to choose directors, officers, or members and they do not permit the University to make decisions about the business of the applicant. The only other factor that Johns Hopkins points to is the University's right to Johns Hopkins' assets if the Foundation is dissolved. That claim again is not explicitly provided for and it is not possible to tell if the University meets or will be the only entity to meet the definition as an eligible recipient. Any entity "having a similar or analogous character or purpose, in some way associated with or connected with the corporation --" is eligible to receive the Foundation's assets.

26. Johns Hopkins argues that because it is a nonprofit, noncommercial entity it is not subject to the Commission's restrictions on changes in ownership. Undoubtedly, there might be more of an argument on this ground if there were a question about who controlled the Foundation or if the directors, officers, and members had changed over a period of years. For example, Johns Hopkins relies on *Seven Locks Broadcasting Co.*, 94 F.C.C. 2d 899 (1983) where claims were made that a licensee, Seven Locks, was controlled by the seven deacons of the Christ Church of Washington (which owned all of its stock) and/or by a former pastor of the church. There, it was urged that, when four deacons changed and the pastor left, control had changed. The church claimed that continuity of control was provided by the congregation of the church, which selected the deacons, and that the pastor was responsible to the deacons. The church compared the deacons to corporate officers of the corporate body or church membership. (The Church also relied on the fact that it had reported the changes, although it had not sought approval for a transfer of control.) The Commission found that there was no evidence that the pastor controlled and that the evidence with regard to the deacons was unclear. There was, the Commission held, no sign of bad faith, presumably because Seven Locks filed accurate and timely ownership reports. In addition, Johns Hopkins relies on *Pacifica Foundation, Washington, D. C.*, 41 F.C.C. 2d 71 (Review Bd. 1973) where changes in Pacifica's board took place on seven occasions between 1969 and 1973. The Review Board found that the changes were significant and that Pacifica's failure to report them warranted an issue but, "under the circumstances," it did not agree that the applicant's failure to file a request for approval of a transfer of control warranted an issue about whether it had violated §310(b) (now §310(d)) of the Communications Act. The Board expressed the view that it was unclear whether §310(b) (now §310(d)) applied to noncommercial entities.[1] That section requires Commission approval before a license can be transferred.

27. Johns Hopkins' changes do not present the same ambiguities that were faced by Seven Locks and Pacifica, nor do they involve an unauthorized transfer of control pursuant to §310(d). Control of Johns Hopkins is spelled

out in corporate documents and it did not, like Pacifica, have to make a judgment about when control changed. Section 73.3573(b) provides that when 50% of the ownership or control changes, a new file number is assigned. Two of three directors, officers, and members changed on June 12, 1987. There is no objective evidence to support Johns Hopkins' claim that The Johns Hopkins University controlled or would be responsible for the license. The rules provide that changes in ownership must be reported and a change of 50% or more means that the application would have to be processed again. Johns Hopkins continued to make filings, including its hearing exhibits which misstated who its directors, officers and members were. There is no ambiguity in §73.3573(b) about whether the 50% standard applies to Johns Hopkins since it is applicable to all FM applicants.

28. Therefore, good cause for acceptance of Johns Hopkins' amendment would depend in part on whether equities dictate that its amendment should be accepted. *See Tequesta Television, Inc.*, 2 FCC Rcd 41, 42 (1987). The Commission has never held that nonprofit noncommercial entities were not required to notify the Commission when those who are or would be responsible for the license were replaced by new people. As the Board held in *Pacifica*, the failure to do so is a violation of §1.65 and may result in disqualification. Moreover, there is no evidence that Johns Hopkins relied on any such belief. It appears that the Foundation's University counsel simply neglected to inform himself as did the Foundation's president. At all times the Foundation was represented by experienced communications lawyers. This is not a case where Johns Hopkins revealed the changes and was led to believe by Commission inaction or delay that the changes were irrelevant.

29. Johns Hopkins told the Commission in testimony provided by its president that no changes had been made in its directors, officers, and members from the time it told the Commission in its application who comprised its board. At no time has Johns Hopkins ever explained how its board president could nominate the board replacements, and two years later represent in testimony that the board members she replaced were still board members. An inference arises that Johns Hopkins either acted so carelessly that the Commission could not rely on it as a licensee or it deliberately misrepresented the truth to protect its status in the proceeding as a viable applicant. In any event, if Johns Hopkins' amendment were granted, an issue would be required to determine whether it is qualified to become a licensee. There is evidence that Johns Hopkins cannot be relied upon to submit to regulatory requirements. Johns Hopkins did not act diligently, it has not asserted equities to excuse its lack of diligence, and its behavior would require further consideration at a hearing to resolve substantial and material questions of fact that have been raised. At this stage of the proceeding, such an issue would be disruptive. The record is closed, proposed findings have been filed, and in this decision the proceeding has been resolved and a construction permit is being granted. Johns Hopkins' petition for leave to amend will be denied.

30. LPB and Kahn's motions to dismiss are granted since Johns Hopkins has changed its control by more than 50%. LPB's motion to enlarge is not without merit but because of the action taken on Johns Hopkins' motion for leave to amend and the motion to dismiss, it is now moot.

FINDINGS OF FACT

Comparative Proposals

Coverage

31. The applicants propose to serve the following total areas and populations: LPB will cover 1,052 square kilometers and 37,480 people and Kahn will cover 761 square kilometers and 40,381 people. Jt. Exh. 1. Each applicant's proposed service area and population already receive five radio services. *Id.*

Diversification of ownership of the mass media

32. **LPB** is the permittee of a low power television station at Ocean Pines and its sole shareholder, Leonard P. Berger, is the chairman of Comcast Cablevision of Maryland Limited Partnership, a cable television company in Baltimore County, Maryland. LPB Exhs. 1 & 2. Mr. Berger and LPB have promised to divest these interests. *Id.*

33. **Kahn** has attributable ownership interest in three commercial radio stations in Florida. Malcolm Kahn, a 33.15% partner in the applicant, owned, at the B cutoff, 51% of S.B.R. Broadcasting, Inc., an AM licensee in Boca Raton, Florida, 51% of Beach Communications, Inc., the licensee of WTHM(FM) in Goulds, Florida, and 95% of Beach Broadcasting Corporation of Florida, the permittee WVBH(FM) in Key Largo, Florida. Kahn Exh. 1. Mr. Kahn was an officer and director of each licensee. *Id.* George V. Delson, who is a 31.85% partner in the applicant, owned the remaining stock in the Boca Raton and Goulds facilities. *Id.* He was also an officer and director. *Id.* The stations are in the Miami/Ft. Lauderdale SMSA in Dade and Broward County, Florida. Key Largo and Goulds are in Dade County and Boca Raton is in Broward County. Key Largo is 969.27 miles from Ocean Pines; Goulds is 937.52 miles, Boca Raton is 879.57 miles.

34. According to the *1989 Broadcasting / Cable Yearbook* and Commission records Boca Raton has one FM, one AM, one educational television station, and service from three cable television systems; Goulds has one FM; Key Largo has one permit for an FM and a cable system. Each community is served by at least 40 AM, 47 FM, and 16 television stations licensed to Miami-Fort Lauderdale-Key West. Boca Raton and Goulds are also within the coverage areas of the West Palm Beach-Ft. Pierce-Vero Beach market of 10 television stations and the Ft. Myers-Naples market of 6 television stations.

35. WSBR, Boca Raton is authorized to operate on 740 KHz with 2.5 kilowatts of daytime power and 500 watts at night. There is an outstanding CP to increase the nighttime power to 940 watts. WVBH(FM) Key Largo is authorized on 103.9 mHz, with effective radiated power of 3 kW and an antenna height of 187 feet above average terrain. WTHM(FM), now WAQI(FM)), Gould operates on 98.3 mHz. Its E.R.P. is 1.1 kW and its HAAT is 462 feet.

Auxiliary power

36. LPB and Kahn have proposed installing auxiliary power generating equipment. LPB Exh. 3; Kahn Exh. 1.

Full-time participation in station operation by station owners

37. **Kahn** is a general partnership with four partners, Malcolm Kahn, George V. Delson, Allen Skolnick, and Saul Hertzig. Kahn Exh. 1. None of the partners propose to work at the station. *Id.*

38. **LPB** is a corporation with one stockholder, Leonard P. Berger. LPB Exh. 1. Mr. Berger is president, treasurer, and director; Jeffrey Michael Lattinville is secretary and director; and Susan E. Childs is a director. *Id.*

39. Leonard P. Berger proposes to work full time, 40 hours per week as the general manager of the station. LPB Exh. 2, at 1. He will direct all operations. He represents that he will reduce his current business activities by 40 hours per week in order to fulfill his promise. LPB Exh. 2 at 2. He states that he has hired a general manager to assume the day-to-day responsibilities he previously undertook in his Ocean City hotel operations. *Id.* That hotel is the Sheraton Ocean City Resort and Conference Center which has 250 rooms and a conference center on four acres with an in-season staff of 300 full and part-time employees. Tr. 68. He also owns twenty-three condominiums in a building adjacent to the Sheraton, the Ocean Club Gateway Hotel, which includes a nightclub and restaurant, and two oceanfront condominiums. Tr. 60; Tr. 83. In addition, Berger owns automobile dealerships in Baltimore County, Maryland, Atlantic City, New Jersey, and Hanover, Pennsylvania. Tr. 61, 65-66. He owns nursing homes in Ohio and Maryland, an athletic club in Maryland and undeveloped land in Maryland and Virginia. Tr. 62, 63, 66-67. He manages his nursing homes from Baltimore where he maintains an apartment. Tr. 60, 61, 64. He also owns residences in Florida and Delaware. Tr. 59.

40. Mr. Berger currently spends 70-80 hours per week, seven days per week at his two hotels, principally the Sheraton and, to a lesser extent, the Ocean Club resort. Tr. 77, 88, 105. The Ocean Club is managed by his daughter. He represents that he has delegated his management responsibilities for his businesses. Tr. 83, 99-100, 65-6, 92, 87. Although he has retained the power to hire and fire personnel in all of his businesses (Tr. 99-101), he describes himself as an active investor who sets direction and tone instead of involving himself in the day-to-day affairs of the business. Tr. 87, 85, 93, 102. Mr. Berger has attempted to have managers at the Sheraton in the past but none of them worked out. He spends ten or twelve hours per day at the Sheraton visiting every part of the hotel. Tr. 98-99, 100-102.

41. LPB has proposed qualitative findings but since no other applicant has proposed that its owners will work at the station, those findings would be superfluous.

CONCLUSIONS

The Impact on LPB of the Finding that Leonard Berger Is a Real - Party - In - Interest In An Applicant For Fenwick Island, Delaware

42. Leonard Berger, who owns all of the stock in LPB, was purportedly a limited partner and 80% equity holder in Fenwick LP (Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a Fenwick Island Broadcast Limited Partnership I), an applicant for a construction permit for FM Channel 221A at Fenwick Island, Delaware. One of the issues designated against Fenwick Island LP in that proceeding was whether Leonard Berger was a real-party-in-interest in the Fenwick Island LP application. *Key Broadcasting Corporation*, 3 FCC Rcd 6587, 6588 (1988). In addition, because the Fenwick Island LP application proposed a 1 mV/m signal that would overlap with Mr. Berger's LPB application for Ocean Pines, Maryland, an issue was designated to determine whether the Fenwick Island LP and the LPB application were inconsistent applications prohibited under §73.3518.

43. An evidentiary hearing was held on these issues and it was found that Leonard Berger organized Fenwick Island LP and that he invited the other partners to join in the proposal because he wanted to do something for them. *Key Broadcasting Corporation*, 3 FCC Rcd 6587, 6598. He retained 80% of the equity, selected the applicant's counsel, contacted an engineer and optioned an antenna site. *Id.* Mr. Berger made partnership contributions, attended meetings of the partners and gave them advice. *Id.* He said he intended to continue to do so. *Id.* It was found that he had the right under the partnership to participate in business decisions involving the broadcast facility, either directly or indirectly. *Id.* When Mr. Berger represented that he was withdrawing from the partnership, he sold his 80% equity to Sharon V. Lyon, who is the president and 49% stockholder in the applicant's general partner, Fenwick Island Broadcast Corporation, for $10. *Id.*, at 6590, 6598.

44. Ms. Lyon and Mr. Berger are intimate friends. *Id.* at 6598. Berger purportedly removed himself from Fenwick Island LP in order to apply for the channel being licensed in this case. *Id.* He did this because his counsel told him to do so. *Id.* However, it was found after a hearing that Berger continued to be involved with activities and decisions made by Fenwick Island L.P. *Id.* In addition, he provided the hearing filing fee for the applicant and he holds the option for the applicant's site.

45. Leonard Berger was provided with an opportunity to show why his representations in the *Key Broadcasting Corporation* case should not disqualify him here. He choose not to introduce any new evidence on the issue. Instead, he urges that the decision in *Key Broadcasting Corporation* did not hold that the applicant Fenwick Island LP should be disqualified but that Leonard Berger should be considered an active partner in the applicant.

46. It was found in *Key Broadcasting Corporation* that Leonard Berger continued to participate in the applicant and that the applicant was subject to his control even after he had notified the Commission that he was no longer an owner. While the implication of the *Key Broadcasting Corporation* conclusions is that Leonard Berger misrepresented his role in Fenwick Island LP from the outset, the presiding officer did not disqualify Fenwick Island LP or consider whether the applicant should be disqualified. The effect of his role was a finding that Fenwick Island LP is a sham applicant and that, secondarily, Leonard Berger held 80% of the control. While those findings and conclusions would indicate that Leonard Berger cannot be relied on to do what he says he will do, it also demonstrates that his proposal for Ocean Pines violates §73.3518.

47. Section 73.3518 provides that "[w]hile an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor, or assignee." While Berger's Fenwick Island proposal has

been pending, he applied for Ocean Pines. The 1 mV/m contours of the two proposals overlap. Although the names are different, control is exercised by Leonard Berger over both the Fenwick Island and Ocean Pines applicants. *Key Broadcasting Corporation*, 3 FCC Rcd 6587, 6598 (1988). LPB's claim that Berger deliberately sought to shed his ownership in Fenwick Island LP before he applied for Ocean Pines is beside the point since it has been found, after a hearing, that he did not.

48. A majority interest in two applicants held by the same persons or entity violates the inconsistent application rule. The Commission has held that under those circumstances the appropriate action to take is the dismissal of the latest filed application. *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493, 3494 (1987), *citing See Agnes J. Reeves Greer*, 45 F.C.C. 2272 (1965). LPB was aware at the outset that Leonard Berger's application in this proceeding might be jeopardized by his actions in Fenwick Island. Because LPB's application violates §73.3518, it will be dismissed.

Comparison of the Applicants

49. Only one applicant, Kahn, is qualified and, therefore, no comparison is required. If one were to be made, both Kahn and Johns Hopkins have attributable mass media interests and LPB has none. Only LPB has promised any integration. While Kahn has challenged the likelihood that LPB's Leonard Berger would operate the Ocean Pines facility, the evidence overall shows that Berger would do so. He has promised to alter his current activities in order to work 40 hours a week. It is, however, a moot point since LPB would prevail over Johns Hopkins and Kahn even if Leonard Berger had made no promise to work at the station since both competing applicants have mass media interests. In addition, the overall coverage differences proposed by the applicants are too minor to warrant any change in the assessment. *See Metro Broadcasting, Inc.*, 99 F.C.C. 2d 688, 699 (Review Bd. 1984). Kahn urges that its greater coverage of under 3,000 people warrants a preference in a close case. That may be, but its media interests are significant enough to outweigh any preference due for its insignificant coverage difference.

ACCORDINGLY, IT IS ORDERED that the motion for leave to amend, filed July 14, 1989 by The Johns Hopkins Broadcasting Foundation IS DENIED.

IT IS FURTHER ORDERED that the motion to dismiss, filed July 27, 1989 by Ocean Pines LPB Broadcast Corp. and motion to dismiss application, filed July 26, 1989 by Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a Ocean Pines Broadcasting Company ARE GRANTED.

IT IS FURTHER ORDERED that the motion to enlarge issues, filed July 27, 1989 by Ocean Pines LPB Broadcast Corp. IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the motion for extension of time, filed June 26, 1989 by Ocean Pines LPB Broadcast Corp. IS GRANTED.

IT IS FURTHER ORDERED that the application of Ocean Pines LPB Broadcast Corp. (File No. BPH-870406KF) and The Johns Hopkins Broadcasting Foundation (File No. BPED 870406MA) ARE DISMISSED WITH PREJUDICE and the application of Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a Ocean Pines Broadcasting Company (File No. BPH-870406KH) for a construction permit for a new FM facility in Ocean Pines, Maryland on Channel 246A IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] In *Pacifica*, the Board noted that the Bureau had been aware of the changes on June 9, 1970 but waited until February 12, 1973 to raise the matter. The Bureau learned about the changes from Pacifica's hearing exhibits which reflected the changes in the board.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-29

In the Matter of

Amendment of Section 73.202(b),	RM-5594
Table of Allotments,	*RM-5885*
FM Broadcast Stations.	
(Eddyville and *Fort Madison, Iowa, Louisiana, Missouri)* [1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 27, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the counterproposal of Talley Broadcasting Company (petitioner) requesting the substitution of Channel 269C2 for Channel 269A at Fort Madison, Iowa, the modification of its license for Station KBKB(FM) accordingly, the substitution of Channel 271A for Channel 269A at Louisiana, Missouri, and the modification of Station KJFM's license accordingly. Petitioner filed the counterproposal in response to the *Notice* herein, 2 FCC Rcd 1507 (1987).[2] Petitioner states that it will apply for the channel, if allotted. By *First Report and Order*, 2 FCC Rcd 7440 (1987), the Commission allotted Channel 268C2 to Eddyville, Iowa, as its first local FM service. However, action on the petitioner's counterproposal was withheld pending resolution of the *Notice of Proposed Rule Making and Order to Show Cause* in MM Docket 86-103, which also proposed the substitution of Channel 271A for Channel 269A at Louisiana, Missouri, and the modification of Station KJFM's licensee accordingly, in order to allot Channel 268A to Troy, Missouri. A *Report and Order* in MM Docket 86-103 allotted Channel 264A to Troy without requiring a channel change at Louisiana, Missouri. In the *Report and Order*, we referred for consideration in this proceeding an *Order to Show Cause* directed to Foxfire. Therefore, the modification of Foxfire's license for Station KJFM will be considered herein. Foxfire and Talley responded to the *Order to Show Cause* in MM Docket 86-103.

2. In a pleading filed by Foxfire, it states that it is currently operating under a Chapter 11 plan of reorganization approved by the U.S. Bankruptcy Court, Eastern District of Missouri, Northern Division. As a result, it states that all available monies are being used to pay its creditors and that it would be virtually impossible for the station to fund the change in channel as requested. Foxfire goes on to state that the continued operation of Station KJFM will be in jeopardy if forced to change channel. It submits that the change in channels will be disruptive to the station's operation in that business could be lost during the period when Station KJFM changes channel and the listening public and advertisers are reeducated to its new position on the dial. While it recognizes that a licensee is not guaranteed financial success, it argues that where the change in channel could cause a station's demise, the public interest lies in favor of the station being forced to change channel. In response, Talley states that it is sympathetic to Foxfire's plight. Therefore, it states that it is willing to advance funds to Foxfire for the change in Station KJFM's channel.

3. We do not believe that Foxfire has presented a substantial and material question of fact which would require a hearing on the proposed modification. As the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. *See, e.g., Marietta, Ohio, and Ravenswood, WV*, 2 FCC Rcd 4681 (1987) and *Albany, NY et al.*, 2 FCC Rcd 4300 (1987), 3 FCC Rcd 4681 (1987). Petitioner has stated that it will not only reimburse Foxfire for the reasonable costs associated with the change in its channel but also advance the necessary funds so that it will not be required to expend out-of-pocket funds for the changeover.

4. Channel 269C2 can be allotted to Fort Madison, Iowa, in compliance with the Commission's minimum distance separation requirements and can be used at Station KBKB's present transmitter site. Use of this site results in a 4.8 kilometer short-spacing to the transmitter site specified in the subsequently filed and currently pending application (ARN-870908NC) of Good News Broadcasters, Inc. for a new station on Channel 266A at Augusta, Illinois. We are, therefore, serving Good News Broadcasters with a copy of this *Report and Order*. [3] Channel 271A can be allotted to Louisiana, Missouri, in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter site of Station KJFM.[4]

5. Based on the above discussion, we believe the public interest would be served by substituting Channel 269C2 for Channel 269A at Fort Madison, Iowa, modifying the license of Station KBKB(FM) accordingly, substituting Channel 271A for Channel 269A at Louisiana, Missouri, and modifying the license of Station KJFM accordingly, since it could enable Station KBKB(FM) to expand its coverage area. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 11, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Fort Madison, Iowa	269C2
Louisiana, Missouri	271A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Talley Broadcasting Company for Station KBKB(FM), Channel 269A, Fort Madison, Iowa, and Foxfire Communications, Inc. for Station KJFM, Channel 269A, Lousiana, Missouri, ARE MODIFIED to specify operation on Channel 269C2 and Channel 271A, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the licensee of Station KJFM, Louisiana, Missouri, and the applicant for Channel 266A at Augusta, Illinois, as follows:

Foxfire Communications, Inc.
Station KJFM
P.O. Box 438
Louisiana, Missouri 63353

Good News Broadcasters, Inc.
Route 1, Box 72
Plymouth, Illinois 62367

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Fort Madison, Iowa, and Louisiana, Missouri, have been added to the caption.

[2] Public Notice of the counterproposal was given on May 1, 1987, Report No. 3034.

[3] While an applicant is protected against the acceptance of untimely-filed competing applications, according to established policy, an applicant's preferred transmitter site is not protected from a rule making petition which proposes a new service. As the Commission has held previously, an applied for, but unauthorized, transmitter site generally reflects a preference for a particular location and thus is not favored over the provision of a new service. *See, Andalusia, Alabama*, 49 FR 32201, August 13, 1984, and cases cited therein.

[4] The coordinates for Channel 269C2 at Fort Madison are North Latitude 40-39-30 and West Longitude 91-16-20. The coordinates for Channel 271A at Louisiana, Missouri, are North Latitude 39-26-29 and West Longitude 91-02-19.

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-597

In the Matter of

Amendment of Section 73.202(b),	RM-5875
Table of Allotments,	RM-6309
FM Broadcast Stations.	
(Haysville and Santa Claus, Indiana)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 27, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 621 (1988), seeking comments on a proposal for the allotment of Channel 277A as a first local FM service to Haysville, Indiana, as requested by Martin L. Hensley (RM-5875). Santa Claus Radio Company filed comments and a counterproposal requesting the allotment of Channel 277A to Santa Claus, Indiana.[2] Hensley responded with reply comments, and stated his intention to apply for the channel, if allotted.

2. While the *Notice* proposed allotting Channel 277A to Haysville, Indiana, Santa Claus Radio Company states that Santa Claus should receive the allotment, since it is the larger of the two communities. We believe that both communities are deserving of a first local FM service. However, Channel 277A is the only channel available to either Haysville or Santa Claus. Thus, we shall base our decision on the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) first full-time aural service;
(2) second full-time aural service;
(3) first local service; and
(4) other public interest matters.
[Co-equal weight given to priorities (2) and (3)]

3. The allotment of Channel 277A to either Haysville or Santa Claus would provide a first local service, thus fulfilling priority (3). Because both proposals would advance priority (3), our decision must consider other public interest factors weighing in favor of one proposal more heavily than the other. In this regard, we note that the incorporated community of Santa Claus (population 514) has a larger population than Haysville (population 350).[3] Thus, we believe that the public interest would be served by allotting Channel 277A to Santa Claus, since it has the larger population.

4. A staff engineering analysis has determined that Channel 277A can be allotted to Santa Claus, Indiana, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 11, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Santa Claus, Indiana	277A

6. The window period for filing applications will open on **December 12, 1989,** and close on **January 11, 1990.**

7. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Martin L. Hensley (RM-5875) requesting the allotment of Channel 277A to Haysville, Indiana, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Santa Claus, Indiana, has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given by March 28, 1988. *See* Report No. 1719.

[3] All population figures are taken from the 1980 Census, unless otherwise indicated.

[4] Coordinates for the Channel 277A allotment are 38-09-41 and 86-58-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-42

In the Matter of

Amendment of Section 73.202(b),	RM-6508
Table of Allotments,	
FM Broadcast Stations.	
(Bolivar, Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 27, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Opel J. Shaw (petitioner)[1], the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1811 (1989), proposing the allotment of Channel 234A to Bolivar, Tennessee, as that community's second local FM service. Petitioner filed supporting comments reiterating an interest in the allotment. No other comments were received.

2. We believe the public interest would be served by alloting Channel 234A to Bolivar, as that community's second local FM service. The channel can be allotted in compliance with the Commission's minimum distance separation requirements.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 11, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bolivar, Tennessee	234A, 244A

4. The window period for filing applications will open on **December 12, 1989,** and close on **January 11, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner is the co-licensee of AM Station WBOL at Bolivar, Tennessee.

[2] The reference coordinates are 35-15-30 and 88-59-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-283

In the Matter of

Amendment of Section 73.202(b), RM-5222
Table of Allotments,
FM Broadcast Stations.
(Potosi, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 27, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 24874, July 9, 1986, proposing the substitution of FM Channel 267A for Channel 249A (vacant) at Potosi, Missouri. The *Notice* was issued in response to a petition filed by EZ Communications, Inc. (EZ Communications), licensee of FM Station KYKY, Channel 251C, St. Louis, Missouri. EZ Communications filed comments in support of the proposal and suggested Channel 284A as another Channel should there be any problem with 267A. Columbia FM filed comments and agreed with petitioner that Channel 284A could be considered as a substitute for Potosi. Contemporary Broadcasting filed opposition comments. EZ Communications and Contemporary Broadcasting filed reply comments.

2. At the time it filed its petition, EZ Communications had an application (BPH851024ID) pending at the Commission to relocate its transmitter site. EZ Communications has filed numerous applications since November, 1983, seeking to relocate its transmitter to provide better service to the community and retain its Class C status. EZ Communications states that it located a site from which it could provide the required coverage, and that site was approved by the local government. However, the relocation would conflict with the vacant allotment of Channel 249A at Potosi. EZ Communications requested the substitution of channels at Potosi to remove the conflict.

3. On March 22, 1989, Station KYKY was licensed as a C1 facility on Channel 251 (BLH 890112KA). Channel 251C1 at St. Louis does not conflict with Channel 249A at Potosi. As stated in the appendix to the *Notice*, continuing interest is required before a channel will be allotted to a community. The *Notice* was adopted in order to permit Station KYKY the opportunity to relocate its transmitter and improve its service. Due to the fact that Station KYKY is now licensed as a C1 facility not requiring a substitution of channels at Potosi, and no other interest has been indicated in the substitution of channels at Potosi, in accordance with Commission policy, no further consideration will be given to the substitution of channels at Potosi.

4. IT IS ORDERED, That the petition of EZ Communications, Inc. IS DISMISSED and this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-403

In the Matter of

Amendment of Section 73.202(b)	RM-5776
Table of Allotments	RM-6189
FM Broadcast Stations	RM-6190
(Douglas, Broxton, Hinesville and Hazelhurst, Georgia.[1])	

ORDER TO SHOW CAUSE

Adopted: October '0, 1989; Released: October 27, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the allotment of Channel 222A to Douglas, Georgia, 2 FCC Rcd 6002 (1987), and comments, counterproposals and replies filed in response to the *Notice*.[2] For the reasons discussed below, we are issuing an *Order to Show Cause* directed against Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM, Hazelhurst, Georgia.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Gerald Lee Carter ("Carter") proposing the allotment of Channel 222A to Douglas, Georgia, as a third local FM service. In response to the *Notice*, Hinesville Broadcasting Corporation ("HBC"), licensee of Station WBLU, Channel 221A, Hinesville, Georgia, filed a counterproposal. This counterproposal proposed the substitution of Channel 222C2 for Channel 221A at Hinesville and modification of the Station WBLU license to specify operation on Channel 222C2. Frank A. Roundtree, Jr. ("Roundtree") submitted a counterproposal proposing the allotment of Channel 222A to Broxton, Georgia, as a first local service. A Channel 222A allotment at Broxton conflicts with the proposed Channel 222A allotment at Douglas, but does not conflict with the Channel 222C2 upgrade at Hinesville.

3. General Broadcasting of Florida, Inc. ("General Broadcasting"), licensee of Station WCAT-FM, Channel 294C1, Leesburg, Florida, filed comments in opposition to a Channel 222A allotment at Douglas, Georgia. General Broadcasting is participating in this proceeding and other related proceedings in order to permit grant of its application to maintain full Class C status at Station WCAT-FM (File No. BPH-860310II). According to General Broadcasting, a Channel 222A allotment at Douglas "might prejudice" proposals in other proceedings looking toward grant of its application. These would include a Channel 223A allotment at Ponte Vedra Beach, Florida (MM Docket No. 85-376). In turn, a Channel 223A allotment Ponte Vedra Beach would permit a Channel 227A allotment at Baldwin, Florida (MM Docket No. 87-77), and a Channel 287A allotment at Fernandina Beach, Florida (MM Docket No. 86-487). These allotments would have permitted grant of its application to maintain full Class C status at Station WCAT-FM.

DISCUSSION

4. In a companion *First Report and Order* in this proceeding, we allotted Channel 279A to Broxton, Georgia, and denied the relief requested by General Broadcasting. There remains a conflict between a Channel 222A allotment at Douglas and a Channel 222C2 upgrade at Hinesville. We have undertaken channel searches for alternate channels for both communities. As a result of those searches, we have determined that Channel 227A could be allotted to Douglas if Station WVOH-FM, Channel 228A, Hazelhurst, Georgia were to change its channel to Channel 229A.

5. We believe that it would be in the public interest to modify the license of Station WVOH-FM to specify operation on Channel 229A. In regard to this proposed license modification, Section 316 of the Act, as amended, and Section 1.87 of the Rules require that we inform the licensee or permittee of the proposed action and the reasons for such action. [3] In the present situation, the public interest would be furthered by having both a first local FM service at Douglas and an upgraded FM service at Hinesville. Channel 229A will comply with the Commission's minimum spacing requirements at the present Station WVOH-FM site.[4] This license modification will permit a new Channel 227A allotment to Douglas and a Channel 222C2 upgrade at Hinesville. The ultimate permittee of the Channel 227A allotment at Douglas and HBC will be required to reimburse Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM, for the legitimate and prudent expenses of changing its channel. The permittee at Douglas and HBC will share this cost on an equal basis.

6. Because changing the channel of Station WVOH-FM from Channel 228A to Channel 229A is a modification of license within the purview of Section 316 of the Communications Act, we are issuing an *Order to Show Cause* directed against Jeff Davis Broadcasters, Inc. In order to obtain a hearing, Jeff Davis Broadcasters, Inc. must now establish a substantial and material question of fact concerning the proposed modification and public interest benefit.

ORDERING CLAUSES

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM, Channel 228A, Broxton, Georgia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 229A.

8. Pursuant to Section 1.87 of the Commission's Rules, Jeff Davis Broadcasters, Inc. may, not later than **December 19, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in this *Order to Show Cause*. The Commission may call upon Jeff Davis Broadcasters, Inc. to furnish additional information. If Jeff Davis Broadcasters, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question of fact pursuant to

Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Jeff Davis Broadcasters, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That a copy of this *First Report and Order and Order to Show Cause* be sent BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Jeff Davis Broadcasters, Inc.
P.O. Box 157
Hazelhurst, Georgia 31539

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Broxton, Hazelhurst and Hinesville have been added to the caption.

[2] Gerald Lee Carter filed supporting comments. Hinesville Broadcasting Corporation and Frank A. Roundtree, Jr. filed comments and counterproposals. Public Notice was given on December 28, 1987 (Report No. 1702). General Broadcasting of Florida, Inc. filed comments and Hinesville Broadcasting Corporation filed reply comments.

[3] *See, Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act,* 2 FCC Rcd 3327 (1987).

[4] The reference coordinates for a Channel 229A allotment at Hazelhurst, Georgia, would be 31-51-15 and 82-34-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-403

In the Matter of

Amendment of Section 73.202(b)	RM-5776
Table of Allotments	RM-6189
FM Broadcast Stations	RM-6190
(Douglas, Broxton, Hinesville and Hazelhurst, Georgia.[1])	

FIRST REPORT AND ORDER

Adopted: October 10, 1989; Released: October 27, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the allotment of Channel 222A to Douglas, Georgia, 2 FCC Rcd 6002 (1987), and comments, counterproposals and replies filed in response to the *Notice*.[2] For the reasons discussed below, we are allotting Channel 279A to Broxton, Georgia. In a companion item, we are issuing an *Order to Show Cause* directed against Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM, Hazelhurst, Georgia.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Gerald Lee Carter ("Carter") proposing the allotment of Channel 222A to Douglas, Georgia, as a third local FM service. In response to the *Notice*, Hinesville Broadcasting Corporation ("HBC"), licensee of Station WBLU, Channel 221A, Hinesville, Georgia, filed a counterproposal. This counterproposal proposed the substitution of Channel 222C2 for Channel 221A at Hinesville and modification of the Station WBLU license to specify operation on Channel 222C2. Frank A. Roundtree, Jr. ("Roundtree") submitted a counterproposal proposing the allotment of Channel 222A to Broxton, Georgia, as a first local service. A Channel 222A allotment at Broxton conflicts with the proposed Channel 222A allotment at Douglas, but does not conflict with the Channel 222C2 upgrade at Hinesville.

3. General Broadcasting of Florida, Inc. ("General Broadcasting"), licensee of Station WCAT-FM, Channel 294C1, Leesburg, Florida, filed comments in opposition to a Channel 222A allotment at Douglas, Georgia. General Broadcasting is participating in this proceeding and other related proceedings in order to permit grant of its application to maintain full Class C status at Station WCAT-FM (File No. BPH-860310II). According to General Broadcasting, a Channel 222A allotment at Douglas "might prejudice" proposals in other proceedings looking toward grant of its application. These would include a Channel 223A allotment at Ponte Vedra Beach, Florida (MM Docket No. 85-376). In turn, a Channel 223A allotment Ponte Vedra Beach would permit a Channel 227A allotment at Baldwin, Florida (MM Docket No. 87-77), and a Channel 287A allotment at Fernandina Beach, Florida (MM Docket No. 86-487). These allotments would have permitted grant of its application to maintain full Class C status at Station WCAT-FM.

DISCUSSION

4. At the outset, we will deny the relief requested by General Broadcasting. General Broadcasting is no longer aggrieved by any allotment that we may make to Douglas, Ponte Vedra Beach, Baldwin or Fernandina Beach. On May 10, 1988, General Broadcasting amended its application to maintain full Class C status for Station WCAT-FM to specify Class C1 facilities. In its "Petition for Leave to Amend in BPH-860310II," General Broadcasting specifically stated that its amendment specifying Class C1 facilities would end "litigation surrounding retention of General's Class C status." The amended application was granted on June 7, 1988. As a result of that action, the Table of FM Allotments will be amended to reflect a Class C1 allotment. *See, Reclassification of FM Facilities Pursuant to Broadcast Docket No. 80 - 90*, 2 FCC Rcd 2124 (1987). The proposed allotment to Douglas would not conflict with General Broadcasting's operation as a Class C1 station.

5. In regard to Broxton, Georgia, we have determined that Channel 279A can be allotted in lieu of the Channel 222A allotment advanced by Roundtree. We will do so in this *First Report and Order*. [3] There remains a conflict between a Channel 222A allotment at Douglas and a Channel 222C2 upgrade at Hinesville. We have undertaken channel searches for alternate channels for both communities. As a result of those searches, we have determined that Channel 227A could be allotted to Douglas if Station WVOH-FM, Channel 228A, Hazelhurst, Georgia were to change its channel to Channel 229A. Because changing the channel of Station WVOH-FM from Channel 228A to Channel 229A is a modification of license within the purview of Section 316(a) of the Communications Act, we are issuing a separate *Order to Show Cause* directed against Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM.

ORDERING CLAUSES

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 11, 1989,** the Table of FM Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Broxton, Georgia	279A

7. The window period for filing applications for the Channel 279A allotment at Broxton, Georgia, will open on **December 12, 1989,** and close on **January 11, 1990.**

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Broxton, Hazelhurst and Hinesville have been added to the caption.

[2] Gerald Lee Carter filed supporting comments. Hinesville Broadcasting Corporation and Frank A. Roundtree, Jr. filed comments and counterproposals. Public Notice was given on December 28, 1987 (Report No. 1702). General Broadcasting of Florida, Inc. filed comments and Hinesville Broadcasting Corporation filed reply comments.

[3] The reference coordinates for the Channel 279A allotment at Broxton, Georgia, are 31-40-34 and 82-56-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 360, 362, 363, 366, 367, 371, and 372
Southern New England Telephone Company Revisions to Tariff F.C.C. No. 39	Transmittal No. 464 and 488
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal Nos. 1850, 1859, and 1861

ORDER

Adopted: October 10, 1989; Released: October 13, 1989

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff transmittals, filed between April 5, 1989, and September 21, 1989, by various local exchange carriers (LECs), contain tariff revisions to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings. Transmittal Nos. 464 and 488, filed by Southern New England Telephone Company, contains ICB rates that conform to the rate structure of its pending generic DS3 tariff. The transmittals filed by the Ameritech Operating Companies and Southwestern Bell Telephone Company describe ICB arrangements outside the scope of their general tariffs for DS3 services. The captioned revisions are scheduled to become effective on dates ranging from October 14, 1989, to November 6, 1989. None of the revisions is opposed.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[1] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 360, 362, 363, 366, 367, 371, and 372, Southern New England Telephone Company, Tariff F.C.C. No. 39, Transmittal Nos. 464 and 488, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1850, 1859, and 1861, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-756.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Transmittal No. 36
Corporation
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: October 10, 1989; Released: October 17, 1989

By the Chief, Common Carrier Bureau:

1. On July, 21, 1989, Contel Corporation (Contel), on behalf of the Contel Telephone Companies, filed Transmittal No. 36 proposing, *inter alia*, to revise its methods of computing nonrecurring charges (NRCs) to expedite or cancel an order for access service by basing such charges on a percentage of the NRC for the service ordered. A petition to suspend and investigate the tariff transmittal was filed by MCI Communications Corporation (MCI) on August 7, 1989 (MCI Petition). Contel filed reply comments on August 17, 1989 (Contel Reply). The tariff revisions are scheduled to become effective on October 19, 1989.

2. MCI requests that the Commission suspend and investigate the proposed changes pending Contel's submission of additional cost support and an estimate of the effect of these revisions on its revenue requirement as defined in Section 61.38(b)(1) of the Commission's Rules, 47 C.F.R. § 61.38(b)(1). MCI Petition at 1, 3, 6. MCI contends that Contel failed to adjust the NRC by an estimate of the average salvage value. *Id.* at 3. MCI also maintains that Contel's practice of applying cancellation charges based on time elapsed may result in some carriers paying cancellation charges that are disproportionate to the costs incurred by Contel *Id.* at 4. It further challenges Contel's method of calculating expedited order charges. MCI alleges that Contel has not shown that the costs of the incremental labor required to move up a service date bear any relationship to the amount of cost incurred to complete the installation in a standard service interval. *Id.* at 5.

3. Contel replies that its proposed ratemaking methodology reasonably reflects the manner in which costs are incurred in its ordering and provisioning process. Contel Reply at 2. It asserts that because the nonrecurring charges associated with switched and special access reflect the average costs incurred in order processing, circuit design, and circuit installation, tying cancellation charges to such cost-based charges more closely aligns the charge with actual costs incurred in the provisioning process. *Id.* at 4. Contel also asserts that adjustments for the estimated salvage value are inappropriate for a charge based solely on labor costs of order processing and installation. *Id.* at 4-5. Contel further contends that the Commission has concluded that expedited order rate structures which are tied to nonrecurring charges are reasonable. *Id.* at 5.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that the proposed revisions present no questions that warrant suspension or investigation of the proposed tariff revisions at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate the captioned transmittal filed by MCI Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136
(Corrected)

In the Matter of

Southwestern Bell Telephone Company Revisions To Tariff F.C.C. No. 68 — Transmittal No. 1861

ORDER

Adopted: October 12, 1989; Released: October 13, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On September 21, 1989, Southwestern Bell Telephone Company (Southwestern) filed Transmittal No. 1861, which established Individual Case Basis (ICB) rates for special access DS3 and dry fiber facilities on behalf of a number of customers.

2. Metropolitan Fiber Systems, Inc. (MFS), on October 6, 1989, filed a petition seeking to suspend for five months and investigate Southwestern's Transmittal 1861.[1] MFS characterizes Transmittal 1861 as yet another attempt by a local exchange carrier to obtain an unlawful and anticompetitive market advantage. MFS Petition at 2. MFS requests that the Bureau incorporate the ICB arrangements in Transmittal 1861 into the Docket No. 88-136[2] investigation and, in addition, suspend those rates for the five-month statutory period rather than for the Bureau's customary one-day suspension period. *Id.* at 2-3.

3. On October 10, 1989, the Chief, Common Carrier Bureau, adopted an Order suspending Transmittal 1861 for one day and including it in the on-going investigation in CC Docket No. 88-136 (*October 10 Order*). In addition, the Order granted Southwestern permission to advance the effective date of Transmittal 1861 on one day's notice. Due to the October 9 Federal holiday the petition filed by MFS had not yet been received by the Common Carrier Bureau as of the Order's adoption date. Therefore, it was not addressed in that Order.

4. The *October 10 Order* effectively grants the relief sought by MFS, except to the extent that the Bureau suspended Transmittal 1861 for one day rather than five months. After review of MFS's petition, we see no reason to suspend the tariff for the additional period it seeks; therefore, we deny its request for a five-month suspension of Transmittal 1861.

5. Accordingly, IT IS ORDERED that the petition to suspend pending investigation proposed Individual Case Basis rates for high capacity and dry fiber services filed by Metropolitan Fiber Systems, Inc. IS GRANTED IN PART and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Petition of Metropolitan Fiber Systems, Inc. To Suspend Pending Investigation Proposed Individual Case Basis Rates For High Capacity Access and Dry Fiber Services, filed Oct. 6, 1989 (MFS Petition).

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Transmittal No. 340
Operating Companies
Tariff F.C.C. No. 2

ORDER

Adopted: October 18, 1989; Released: October 18, 1989

By the Chief, Common Carrier Bureau:

1. On July 21, 1989, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 340 proposing to clarify the application of Carrier Common Line Charges (CCLCs) and switched access rates when service is provided in conjunction with mobile telephone service. Ameritech also proposes to estimate billed access minutes based on previously known values when customer message detail is not available due to lost or damaged recording tapes. On August 7, 1989, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Ameritech Transmittal 340; Ameritech replied on August 17, 1989. The tariff revisions are scheduled to become effective on October 19, 1989.

2. MCI contends that as presently worded, the tariff would permit cellular telephone traffic which "leaks" into the local loop to avoid assessment of the required nontraffic sensitive (NTS) charges in violation of Section 69.115 of the Commission's Rules. MCI Petition at 2-3. MCI argues that a cellular telephone which permits calls to leak into the local loop should be assessed the Message Station Equipment Recovery Charge and Special Access Surcharge like any other telephone which permits calls to use the local loop without paying NTS access charges. *Id.* at 3. MCI requests that Ameritech clarify this language to specifically state: "For all Switched Access services provided in conjunction with a Cellular Carrier or RCC where Telephone Company common line facilities *are* used, NTS charges as set forth in paragraph 7.5.11 and 7.5.12 *do* apply." *Id.* (emphasis in original). MCI also asserts that Ameritech's proposal to estimate billable usage when recording tapes are lost or damaged is vague and discriminatory. *Id.* at 5.

3. Ameritech replies that its proposed revisions eliminate CCLCs only where its common line facilities are not used, and that all regular NTS charges apply if common line facilities are used. Ameritech Opposition at 2. It observes that the tariff itself indicates that switched access service provided to cellular carriers and radio common carriers is subject to all regulations, rates, and charges of its access tariff. *Id.* Ameritech also states that MCI's objections to the proposed tariff language regarding lost billing tapes is puzzling in light of the fact that MCI withdrew its objections to an earlier National Exchange Carrier Association (NECA) tariff provision dealing with estimated billing when NECA changed the language to the same language now contained in Ameritech Transmittal 340. *Id.* at 2-3. Ameritech maintains that its process for reconstructing lost billing information is nondiscriminatory and that the process has been used in the past to the satisfaction of its customers. *Id.* at 3.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that the proposed revisions are not patently unlawful so as to warrant rejection and present no questions that warrant suspension or investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate the captioned transmittal filed by MCI Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 20, 1989

SOUTHWESTERN BELL FILES PETITION FOR WAIVER REGARDING ACCESS SERVICE OFFERING
Pleading Cycle Established

On October 12, 1989, Southwestern Bell Telephone Company (Southwestern) filed a petition for waiver of Part 69 of the Commission's Rules to permit the establishment of proposed rate elements and reallocation of the associated costs and investment for Operator Call Processing (OCP). OCP consists of two services to access customers, O-Transfer and Inward Assistance. O-Transfer permits the end user to request call routing to a participating access customer; Inward Assistance provides a customer with busy line verification, call interrupt, or operator assistance. On the same date, Southwestern filed Transmittal No. 1874, scheduled to become effective February 2, 1990, to provide OCP service to access customers.

Interested parties should consolidate their comments on the Southwestern waiver petition with their comments on the Southwestern tariff filing. Consolidated comments are due no later than November 7, 1989. Reply comments concerning the waiver and the tariff transmittal may be filed no later than November 15, 1989.

Parties are requested to furnish copies of comments and reply comments to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of Southwestern's waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all comments and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each comment or reply must be filed with ITS.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY
Revisions to Tariff F.C.C. No. 68

Transmittal Nos. 1815 and 1876

ORDER

Adopted: October 20, 1989; Released: October 23, 1989

By the Chief, Common Carrier Bureau:

1. On October 13, 1989, this Bureau issued an Order[1] which, *inter alia*, granted a partial allowance of rate increases proposed by Southwestern Bell Telephone Company (SWB) in the above-captioned transmittal. We directed SWB to issue supplements reflecting the partial allowances and employing Rate Adjustment Factors, in compliance with the *Access Review Order*, no later than October 19, 1989, to become effective October 23, 1989.

2. On October 19, 1989, SWB filed Transmittal No. 1876 in compliance with the *Access Review Order*. SWB contemporaneously filed a petition for waiver from the effective date ordered in the *Access Review Order*, stating that the effective date required in that Order would pose an unnecessary burden on SWB's customers and other interested parties. SWB explains that due to a rate change pursuant to its Transmittal No. 1853, scheduled to become effective October 28, 1989, its customers will potentially be subjected to two rate increases within five days. In addition, SWB notes that on November 2, 1989, it will be required to file separations changes which may again change rates effective January 1, 1990. SWB seeks to reduce the number of rate changes to which its customers will be subjected by incorporating the partial allowances in the *Access Review Order* into its November 2, 1989, filing, to be effective on a prospective basis beginning on January 1, 1990. SWB Petition at 1-3.

3. We have reviewed the petition filed by SWB and find that SWB has demonstrated good cause to grant the waiver as requested.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c)(1) of the Communications Act, 47 U.S.C. §§ 154(i), 155(c)(1), and Section 0.91(f) of the Commission's Rules, 47 C.F.R. § 0.91(f), that the waiver granted by Southwestern Bell Telephone Company IS GRANTED.

5. IT IS FURTHER ORDERED that Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, ARE WAIVED for the purpose of compliance with this Order and Special Permission No. 89-799 IS ASSIGNED.

6. IT IS FURTHER ORDERED that this Order IS EFFECTIVE on adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Transmittal No. 1815, Memorandum Opinion and Order, DA 89-1254, released Oct. 13, 1989 (Com.Car.Bur.) (*Access Review Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 25, 1989

PROCEDURES FOR JANUARY 1, 1990, ACCESS TARIFF REVISIONS TO BE FILED ON OR BEFORE NOVEMBER 2, 1989

Local exchange carriers (LECs) are required pursuant to our Order[1] to file updates to access tariff rates to become effective January 1, 1990, on not less than 60 days' notice. Therefore, we anticipate receiving these filings on or before November 2, 1989. In this Public Notice, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are *not* part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should *not* bear any docket number but must instead bear the designation " *JANUARY 1, 1990, ACCESS TARIFF REVISIONS* ". All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's commercial contractor, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C.

TARIFF FILINGS

LECs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. LECs are especially reminded that (1) the tariff filing must be accompanied with the appropriate filing fee of $250, and (2) they must serve a copy on ITS. Those access filings submitted on or before November 2, 1989, must be delivered to ITS at the Commission in Room 535, 1919 M Street, N.W., Washington, D.C.

LECs, regardless of whether they are filing their own individual tariffs, are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. § 61.58(a)(4), concerning rate increases in particular. LECs are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773. In an effort to facilitate identification and cataloging of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such, *e.g.* : BELL ATLANTIC, TRANS. LTR. #XXX, DATE, JANUARY 1, 1990, ACCESS TARIFF REVISIONS. These revised pages should not be submitted in a binder, but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support submitted with these revisions and associate the list with the cost support *and* the transmittal letter.

3. Submit cost support material pursuant to the Public Notice dated December 3, 1986, DA 86-337, and label the cost support with the name of the LEC, the transmittal number, the subject of the filing and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR #XXX, JANUARY 1, 1990, ACCESS TARIFF REVISIONS.

4. Each LEC should also submit its certification as required by the *Cost Support Order*.

5. In addition to the paper copies, each Tier 1 and Tier 2 LEC, except those Tier 2 LECs that participate in the National Exchange Carrier Association (NECA) Carrier Common Line (CCL) pool, but file their own tariffs for End User Common Line or Traffic Sensitive rate elements, must submit its Tariff Update Format (TUF) in two copies on computer "floppy disks." As indicated in the Attachment to this Notice, one copy of the "floppy disks" should be filed with ITS at the time of filing the access tariffs. The second copy should be filed with Mark Uretsky, Tariff Review Branch, in Room 514. While Tier 2 LECs are not required to submit their TUF information on "floppy disks" for the January 1, 1990, access tariff revisions, those possessing the capability to file "floppy disks" are encouraged to do so.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due no later than November 20, 1989, regardless of whether the tariff revisions are submitted on or before November 2, 1989. Replies may be filed only by the publishing LECs and will be due on December 1, 1989.[2] Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and *not* a docket number. Petitions should be organized where posssible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served simultaneously upon the publishing LEC or petitioner. Additionally, ITS must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary of the Commission. These comments should specify that they concern the JANUARY 1, 1990, ACCESS TARIFF REVISIONS or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the JANUARY 1, 1990, ACCESS TARIFF REVISIONS may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's commercial contractor, ITS. Parties should contact Wilbur Thomas of ITS at (202) 857-3800.

FEDERAL COMMUNICATIONS COMMISSION

For further information, contact: Judy Nitsche, Chief, Tariff Review Branch (632-5550).

FOOTNOTES

[1] *See* In the Matter of Commission Requirements for Cost Support Material To Be Filed with January 1, 1990, Access Tariff Revisions, Order, DA 89-1056, released Sept. 1, 1989 (Com.Car.Bur.)*(Cost Support Order)*.

[2] *See* In the Matter of Commission Requirements for Cost Support Material To be Filed with January 1, 1990, Access Tariff Revisions, Order, DA 89-1187, released Sept. 27, 1989(Com.Car.Bur.).

Attachment

NOVEMBER 2, 1989, SIMPLIFIED FLOW THROUGH TARIFF FILING

NUMBER OF COPIES

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Update HARD COPY	Format DISKETTE	VOL. 1 D&J ONLY	VOL. 1 D&J PLUS REMAINDER OF 61.38 MATERIAL
FEE SECTION ROOM L-18	1	2	-	-	-	-
PUBLIC REFERENCE ROOM---ROOM 513	1	1	-	-	-	-
ITS - ROOM 535 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
JOHN CIMKO ROOM 518	1	1	-	-	1	-
DANIEL GROSH ROOM 518	1	1	-	-	1	-
ANN STEVENS ROOM 518	1	1	-	-	1	-
JUDY NITSCHE ROOM 514	1	1	-	-	1	-
MARK URETSKY ROOM 514	1	-	2	1	-	2
PEYTON WYNNS ROOM 538	-	-	1	-	-	-
KEN MORAN ACCTG & AUDITS DIVISION 2000 L ST., N.W. ROOM 812	1	1	1	-	-	1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-583

In the Matter of

Amendment of Section 73.202(b), RM-6429
Table of Allotments,
FM Broadcast Stations.
(Meeker, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 30, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 303 (1989), proposing the allotment of Channel 233A to Meeker, Colorado, in response to a petition filed by James H. Hicks (petitioner). Comments were not received from the petitioner or any other party expressing interest in the allotment at Meeker.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of James H. Hicks, requesting the allotment of Channel 233A to Meeker, Colorado, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-93

In the Matter of

Amendment of Section 73.202(b), RM-6372
Table of Allotments,
FM Broadcast Stations.
(Imboden, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 30, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 3799 (1989), proposing the allotment of Channel 289A to Imboden, Arkansas, as that community's first local broadcast service, in response to a petition filed by Jim Atkinson (petitioner). Comments were not received from the petitioner or any other party expressing interest in the allotment at Imboden, Arkansas.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Jim Atkinson, requesting the allotment of Channel 289A to Imboden, Arkansas, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-11

In the Matter of

Amendment of Section 73.202(b), RM-6553
Table of Allotments,
FM Broadcast Stations.
(Mount Gilead, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1989; Released: October 30, 1989

By the Chief, Allocations Branch:

1. At the request of Ohio Bible Study Group (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1594 (1989), proposing the allotment of Channel 236A to Mount Gilead, Ohio, as the community's first local FM service. The petitioner filed supporting comments in which it restates its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 236A to Mount Gilead, Ohio, since an interest has been expressed in providing the community with its first local FM service. Channel 236A can be allotted to Mount Gilead in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.7 miles) northeast to avoid a short-spacing to Station WSNY, Channel 234B, Columbus, Ohio, and Station WKTN, Channel 237A, Kenton, Ohio.[1] Canadian concurrence has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 14, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Mount Gilead, Ohio	236A

4. The window period for filing applications will open on **December 15, 1989,** and close on **January 16, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-34-16 and West Longitude 82-49-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-4

In the Matter of

Amendment of Section 73.202(b),	RM-6565
Table of Allotments,	RM-6730
FM Broadcast Stations.	
(Mansfield, Pennsylvania, and	
Vestal, New York)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1989; Released: October 30, 1989

By the Chief, Allocations Branch:

1. At the request of Kennedy Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1332 (1989), proposing the allotment of Channel 277A to Mansfield, Pennsylvania, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. In addition, David G. Mitchell ("Mitchell") filed a counterproposal requesting the substitution of Channel 277B1 for Channel 277A at Vestal, New York, the modification of his construction permit for Station WMXW accordingly, and the allotment of Channel 222A to Mansfield, Pennsylvania.[2]

2. We believe the public interest would be served by allotting Channel 222A to Mansfield, Pennsylvania, since an interest has been expressed in providing the community with its first local FM service, and by substituting Channel 277B1 for Channel 277A at Vestal, New York, since it could enable Station WMXW to expand to its coverage area. As requested, we will modify Mitchell's construction permit for Station WMXW at Vestal, New York, to specify operation on the higher powered channel.

3. Channel 222A can be allotted to Mansfield, Pennsylvania, with a site restriction of 9.7 kilometers (6 miles) north to avoid a short-spacing to unoccupied but applied for Channel 222A at Riverside, Pennsylvania, and to the proposed allotment of Channel 222A to Lewisburg, Pennsylvania. Channel 277B1 can be allotted to Vestal, New York, with a site restriction of 11.1 kilometers (6.9 miles) southeast to accommodate petitioner's desired transmitter site. [3] Canadian concurrence in both of the allotments has been received since Mansfield and Vestal are located within 320 kilometers (200 miles) of the U.S.- Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 14, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Vestal, New York	277B1
Mansfield, Pennsylvania	222A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of David G. Mitchell (BPH-870331MJ) for Station WMXW at Vestal, New York, IS MODIFIED to specify operation on Channel 277B1, in lieu of Channel 277A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. The window period for filing applications for Channel 222A at Mansfield, Pennsylvania, will open on **December 15, 1989,** and close on **January 16, 1990.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Vestal, New York, has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on April 20, 1989, Report No. 1776.

[3] The coordinates for Channel 222A at Mansfield are North Latitude 41-53-35 and West Longitude 77-05-47. The coordinates for Channel 277B1 at Vestal are North Latitude 42-00-00 and West Longitude 75-59-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-13

In the Matter of

Amendment of Section 73.202(b), RM-6547
Table of Allotments,
FM Broadcast Stations.
(Gleneden Beach, Sweet Home and
Toledo, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1989; Released: October 30, 1989

By the Chief, Allocations Branch:

1. At the request of Galaxy Broadcast Partners (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 1416 (1989), proposing the substitution of Channel 296C2 for Channel 296A at Sweet Home, Oregon, and the modification of license for Station KNKN to specify the higher powered channel. In addition, the *Notice* proposed the substitution of Channel 264A for Channel 296A at Toledo, Oregon, the modification of Station KTDO-FM's license accordingly, and the substitution of Channel 236C2 for unoccupied Channel 264C2 at Gleneden Beach, Oregon. The petitioner, Stephanie Linn ("Linn"), and Hal D. Fowler ("Fowler"), both applicants for Channel 264C2 at Gleneden Beach, filed comments and petitioner and Linn filed reply comments.

2. Petitioner supports the proposed substitutions at Toledo and Gleneden Beach in order to permit the upgrading of its Station KNKN. It also reiterates its intention to reimburse the licensee of Station KTDO-FM for the reasonable costs associated with its change of channel. Linn opposes the substitution of channels at Gleneden Beach, stating that the use of Channel 236C2 at the transmitter site proposed in her application would result in a short-spacing to Station KOOS-FM at North Bend, Oregon. Fowler does not oppose the substitution of channels but believes that the petitioner should be required to reimburse him for the cost of amending his application or modifying the new Gleneden Beach facilities if constructed prior to the resolution of this proceeding.

3. In response, petitioner notes that its proposal was filed and adopted prior to the receipt of the Gleneden Beach applications. However, in response to Linn's opposition, it has conducted a channel search and found that Channel 248C2 can be allotted to Gleneden Beach at the transmitter sites proposed by both applicants. Therefore, it urges adoption of its proposal as outlined in the *Notice* with the exception of changing the Gleneden Beach allotment to Channel 248C2.[1]

4. We believe the public interest would be served by adopting the amended proposal to substitute Channel 248C2 for Channel 264C2 at Gleneden Beach, substitute Channel 264A for Channel 296A at Toledo, and substitute Channel 296C2 for Channel 296A at Sweet Home, Oregon, since it could enable Station KNKN to expand its coverage area. Charles E. Farmer, licensee of Station KTDO-FM, Toledo, Oregon, did not respond to the *Order to Show Cause* and thus is deemed to have consented to the modification of its license to specify Channel 264A. Petitioner is, of course, expected to reimburse Farmer for the reasonable costs associated with the change of Station KTDO-FM's channel. We will not, however, require the petitioner to reimburse Linn and Fowler for the costs associated with the change in their applications to specify the new channel at Gleneden Beach. Although such reimbursement is required for existing authorizations, this policy does not extend to applicants. However, both Linn and Fowler will retain their cut-off protection. *See, Marion, Mississippi*, 4 FCC Rcd 3720 (1989).

5. Channel 296C2 can be allotted to Sweet Home and Channel 264A can be allotted to Toledo in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter sites of Stations KNKN and KTDO-FM, respectively. Channel 248C2 can be allotted to Gleneden Beach without the imposition of a site restriction and can be used at the transmitter sites specified by both Linn and Fowler.[2]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 14, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gleneden Beach, Oregon	248C2
Sweet Home, Oregon	296C2
Toledo, Oregon	264A

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Galaxy Broadcast Partners for Station KNKN, Sweet Home, Oregon, IS MODIFIED to specify operation on Channel 296C2, in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KTDO-FM, Toledo, Oregon, IS MODIFIED to specify operation on Channel 264A in lieu of Channel 296A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KTDO-FM's license, BLH-801128AB, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-801128AB, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: Charles E. Farmer, Station KTDO-FM, P.O. Box 568, Toledo, Oregon 97391.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Linn filed a supplement to her reply comments stating that she had no objection to the allotment of Channel 248C2 to Gleneden Beach since it could be used at her applied-for transmitter site.

[2] The coordinates for Channel 296C2 at Sweet Home are North Latitude 44-26-05 and West Longitude 122-42-23. The coordinates for Channel 264A at Toledo are North Latitude 44-38-40 and West Longitude 124-00-52. The coordinates for Channel 248C2 at Gleneden Beach are North Latitude 44-52-53 and West Longitude 124-01-59. The coordinates for the Linn application (BPH-890118MA) are North Latitude 44-45-22 and West Longitude 124-02-57. The coordinates for the Fowler application (BPH-890118MB) are North Latitude 44-52-30 and West Longitude 123-59-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur Service Rules to Change the Name of Amateur Extra Class Operator License	RM-6648

ORDER

Adopted: October 20, 1989; Released: October 31, 1989

By the Chief, Private Radio Bureau:

1. On December 27, 1988, Keith Greiner filed a petition (RM-6648) to amend Section 97.9(a) of the Commission's Amateur Radio Service Rules, 47 C.F.R. § 97.9(a). The petitioner requests that the name of the Amateur Extra Class operator license be changed to Master of Radio Communications Class operator license. According to the petitioner, the proposed name better describes the level of expertise held by this highest class of amateur operator license. Fifteen comments on the petition were received[1] with nine comments generally supporting the proposal and six comments opposed.

2. Section 97.9(a) of the Rules establishes five classes of amateur operator license that represent increasing levels of technical and operational skills. The Amateur Extra Class has stood for the highest level of amateur operator license for nearly 38 years.[2] Approximately ten percent of the 460,000 amateur operators licensed by the Commission have reached this pinnacle.

3. In addition to requiring a change in Part 97, changing the name of the Amateur Extra Class operator license would require revision to the Commission's license application form (FCC Form 610) and modifications to its licensee data base. Furthermore, such a change would require volunteer examiners and volunteer examiner coordinators to revise their *Certificate of Successful Completion of an Examination* forms as well as other forms used in the volunteer examiner system. Implementation of the petitioner's request would thus require significant efforts not only by the Commission but also by the volunteer examiners and volunteer examiner coordinators. Yet the public benefit of the proposed name change is not clear. The fact that only fifteen members of the public participated in this proceeding (and disagreed as to the desirability of the proposed action) out of an amateur community numbering almost half a million licensees is some indication that the perceived advantage of the name change is minimal at best. In addition, the proposal makes no changes in the operating privileges nor would it affect the day-to-day operating practices of the amateur community. Thus, the proposal imposes significant costs without any identifiable benefits to the Amateur Radio Service. In view of the clear cost of undertaking this rule change and the questionable benefits involved, we conclude that a proposal changing the name of the Amateur Extra Class operator license is not in the public interest and does not warrant consideration by the Commission at this time. *See* 47 C.F.R. § 1.401(e).

4. Accordingly, pursuant to Sections 0.131, 0.331 and 1.401(e) of the Commission's Rules (47 C.F.R. §§ 0.131, 0.331, and 1.401(e)), IT IS ORDERED that the Petition for Rule Making filed by Keith Greiner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Comments in support of the proposed change were filed by Robert W. Cross, Larry W. Garens, Aaron Greiner, Loren M. Greiner, Steven L. Karty, Richard Meuse, Larry J. Newby, and M.L. Van Roekel. The petitioner also filed supporting comments. Comments in opposition to the proposal were filed by John A. Alden, Greg Bruce, Michael T. Helm, Frederick K. Smallwood, Richard Steck, and William G. Welsh.

[2] The Amateur Extra Class operator license became available to qualified applicants January 1, 1952, as part of a complete restructuring of amateur operator licenses. *See Report and Order,* Docket 9295, 42 FCC 198 (1951).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-309

In the Matter of

Amendment of Section 73.606(b), RM-5807
Table of Allotments,
TV Broadcast Stations.
(Montrose and Scranton, Pennsylvania)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1989; Released: October 31, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration ("Petition") of the *Report and Order* (" *Order* ") in this proceeding, 53 FR 8903, March 18, 1988, filed by Christian Discerner, Inc. ("Discerner"). Discerner had requested the reallotment of vacant TV Channel 64 from Scranton, Pennsylvania, to Montrose, Pennsylvania, as that community's first local TV service. Ted H. Ehrhardt, Jr. d/b/a Ehrhardt Broadcasting ("Ehrhardt"), an applicant for Channel 64 in Scranton (BPCT-870616KH), filed an opposition to the Petition.

2. The *Order* declined to grant Discerner's request on the grounds that two applications had been filed for the use of Channel 64 in Scranton. We pointed out that while Discerner had shown that Montrose is a community that the "Commission could consider as meriting its own local television service," its status as a county seat without local service was insufficient to override the Commission policy of not reallotting a channel where significant interest had been expressed in retaining an existing allotment. We noted that the two applications had been filed by the cut-off date for the filing of competing applications, which was two months prior to the issuance of our notice proposing the reallotment of Channel 64 to Montrose. We also noted that Discerner failed to adequately support its contention that Montrose receives inadequate service because of poor reception.

3. In its petition for reconsideration, Discerner argues that since its rule making petition was filed before the applications for Scranton were filed, it was error for the Commission to adopt a cut-off date for those applications. Discerner says it believed that neither of the applications could be granted because its proposal to reallot the channel to Montrose preceded the two application filings. This belief is based on Discerner's "understanding that the Commission does not ordinarily grant cut-off status" to such filings after a mutually exclusive rule making petition is filed. However, Discerner considers the grant of cut-off status as placing it in the "impossible situation" of not being able to file for Scranton because it would be inconsistent with its reallotment proposal, and being precluded from applying for Channel 64 because the *Order* denied its proposal for Montrose. Due to the "unique circumstances of this proceeding", Discerner claims that it is entitled to relief by retaining the Channel 64 allotment in Scranton, but amending the allotment to include applications for any other community within a 30-mile radius of Scranton, which would include Montrose. Discerner claims that "ample precedent" exists for its proposal, in that the Commission once had allowed applications for any community not in the Table of Allotments as long as that community was within a specified distance of a community already listed in the Table. Finally, Discerner proposes that existing applicants for Scranton would still have cut-off rights with respect to new Scranton applicants and face in a hearing only any additional applicants for Montrose. Accordingly, Scranton applicants would not be prejudiced by these additional applicants "because they knew or should have known that [Discerner's] rule making petition was on file and that a grant thereof could result in the dismissal of their applications," argues Discerner.

4. In opposition, Ehrhardt asserts that while it has been Commission policy to delay processing applications pending the outcome of related rule making proceedings, that policy is not triggered by the filing of a petition for rule making, but the issuance of a notice of proposed rule making. Ehrhardt notes that when the Commission has received a petition to reallot a long-vacant channel, upon the later filing of an application for that channel, the allotment is retained and the application acted upon. Ehrhardt insists that Discerner's argument (that the filing of an allotment request delays the processing of mutually exclusive applications already filed) is inapposite to the situation here, in which the Commission proposed a reallotment having mistakenly assumed that no interest had been expressed in the Channel 64 allotment. Moreover, Ehrhardt asserts, had there been applications on file to operate on a vacant channel, the Commission very likely would not have initiated a rule making to reallot that channel under the policy that no reallotments would occur where expressions of interest have been made.

5. Ehrhardt claims there is no precedent for Discerner's alternative request for equitable relief, and that its proposal to now allow applications for Montrose is contrary to policy that the Commission expressed in deleting the "15 mile rule." Ehrhardt insists that Discerner could have filed an application for Scranton to preserve its position, despite its alleged fear of inconsistency in proposing to reallot Channel 64 to Montrose. In any event, argues Ehrhardt, Scranton is the preferred community, and even more so because Discerner did not demonstrate its claim of poor reception in Montrose (of the nearby Scranton and Binghamton, New York, television stations).

DISCUSSION

6. After a review of Discerner's petition for reconsideration, it will be denied. The *Order* was correct in its statement of long-standing Commission policy that a channel allotment will not be reallotted when interest has been expressed in operating a station on that channel, absent a compelling reason for the reallotment. *See Fond du Lac and Sheboygan, Wisconsin*, 55 RR 2d 592, 594 (1983) and the cases cited therein. Given that such interest had been expressed for the vacant allotment in Scranton, Discerner gave no sufficient reason to abrogate this policy. We also reject Discerner's novel proposal that

we amend the allotment, permitting the filing of applications for surrounding communities including Montrose, because no legitimate grounds for grant of such relief are presented. Moreover, such a grant would be contrary to prevailing policy in allotment proceedings.

7. In the case at hand, interest was expressed in operating on Channel 64 in Scranton by the filing of two applications, which were later afforded cut-off protection. Notwithstanding Discerner's earlier filing of a proposal to reallot the channel to Montrose, we adhere, in this case, to the principle of not reallotting the channel where such interest has been expressed. Here, Discerner filed only a petition to change the allotment. No notice of proposed rule making had been issued by the Commission prior to the filing of the applications. Nevertheless, as pointed out by Ehrhardt, the Commission likely would not have issued its notice of proposed rule making had we noted that the applications had been filed evidencing such an interest. More important, as was correctly expressed in the *Order*, Discerner gave no sufficient, compelling reasons for overturning this policy.[1]

8. Additionally, we find no basis for the relief that Discerner characterizes as equitable. The "impossible situation" Discerner complains of raised no bar to Discerner's filing for Channel 64 in Scranton to preserve its position there, and at the same time requesting a reallotment to Montrose. Furthermore, contrary to Discerner's argument, there is nothing unique about this proceeding that justifies any fashioning of an equitable remedy for Discerner. It has made no showing that our rules and policies are inadequate to deal with circumstances like those in the instant case, nor has Discerner shown that our rules and policies worked an undue, unavoidable hardship on it. Therefore, Discerner has provided no basis for the relief it requests.

9. Moreover, the proposed equitable solution is starkly inconsistent with our elimination in Docket 82-320 of the rules permitting applicants to file for any community within a certain radius of a community already in the Table of Allotments. In the *Report and Order* in that docket, 53 RR 681 (1983), the Commission indicated that the 15-mile rule, which provided for flexibility in assigning channels within a limited area near the communities listed in the tables of allotment for FM and TV, and without a rule making, had outgrown its usefulness. We noted that such a rule on too many occasions led to a hearing and that the issues raised could more efficiently and at less cost be resolved in a rule making proceeding. *Report and Order* at 693. Here, Discerner has offered no reasons why these concerns are not as relevant in the instant case as we found in BC Docket 82-320. Thus, we reject Discerner's unsupported request for equitable relief.

CONCLUSION

10. We conclude that the *Order* should be affirmed, and that the general Commission policy of not reallotting a channel where interest has been expressed should be followed in this case. Discerner's petition for reconsideration provides insufficient reasons for departure from that policy and no basis for any relief in equity.

11. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED That the Petition for Reconsideration filed by the Christian Discerner, Inc. IS DENIED.

12. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202)632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] We note in passing that Discerner made no allegations or suggestions that the applications were not legitimate or that they were filed in bad faith, for example, as an attempt to defeat a competitor's proposal, with no intention to ultimately construct a station and to provide service to the public. We would consider an adequate showing that an application had been filed purely for "tactical" purposes as constituting a compelling reason for not following the policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TV Answer, Inc. RM-6196
Petition Requesting
One Half MHz centered at 218.25 MHz
for a TV Viewer-Response System.

ORDER GRANTING EXTENSION OF TIME

Adopted: October 20, 1989; Released: October 23, 1989

By the Office of Engineering and Technology:

1. Waterway Communications System, Inc., (Watercom), operator of an Automated Maritime Telecommunications System in the Mississippi River region, requests an extension of the comment and reply periods that were established for two supplemental filings in this proceeding. *See* Public Notice 4551, released September 25. The supplemental filings contained engineering data gathered by TV Answer Inc., in support of its petition.

2. Watercom, states that TV Answer's submissions are substantial documents and require detailed review by Watercom's engineers. Watercom believes, considering that TV Answer has taken nearly a year to reformulate its viewer-response system, that a thirty day extension will not adversely impact this proceeding.

3. The Commission is interested in obtaining as complete a record as possible before acting on the subject petition. We believe that additional time for filing reply comments is appropriate in light of the complexity of the issues raised in this proceeding. Accordingly, pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that the comment and reply periods for responding to TV Answer's supplemental filings IS EXTENDED to November 24, and December 11, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Acting Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-137

In re Applications of

ROY E. HENDERSON d/b/a PUEBLO RADIO BROADCASTING SERVICE	File No. BPH-861002TA
SANCHEZ COMMUNICATIONS, INC.	File No. BPH-861002TB
HAL S. WIDSTEN	File No. BPH-861002TE
O-V- COMMUNICATIONS	File No. BPH-861002TH

For Construction Permit for a New FM Station on Channel 248A in Oro Valley, Arizona

Appearances

Forbes W. Blair, Esq., Marjorie K. Conner, Esq. and *Richard J. Hayes, Jr., Esq.* on behalf of Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service; *David F. Tillotson, Esq.* on behalf of Hal S. Widsten; *Aaron Shainis, Esq.* on behalf of O-V Communications; and *Charles E. Dziedzic, Esq.* and *Jerry Hermele, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: October 23, 1989; Released: October 31, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of the four remaining applicants in this case: Roy E. Henderson d/b/a Pueblo Radio Broadcasting Services ("Pueblo"), Sanchez Communications, Inc. ("SCI"), Hal S. Widsten ("Widsten"), and O-V Communications ("O-V") for a construction permit for a new FM Station on Channel 248A at Oro Valley, Arizona. This was initially an eight party case designated for hearing under *Hearing Designation Order* (*HDO*) DA 88-380, 2 F.C.C. Rcd 2010, released April 8, 1988, published at 53 Fed. Reg. 12,593 (April 15, 1988).[1]

2. The following issues which were set under the *HDO* remain to be decided:

(a) To determine which of the proposals would on a comparative basis, best serve the public interest.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

HDO at Para. 8.[2]

3. A prehearing conference was held on July 8, 1988, in which procedural and trial dates were set. *See Order*, FCC 88M-1912, released June 20, 1988. Discovery was held in abeyance at the request of the parties to permit settlement negotiations. *See Order*, FCC 88M-2755, released August 23, 1988. Written frozen testimony was exchanged on November 14, 1988, and hearings were held in Washington, D.C. on December 1, 2, 5 and 6, 1988. The record was closed on December 6, 1988, except for the submission of a post-hearing Stipulation on comparative coverage. Thereafter, a Stipulation was accepted which established that there was no significant difference in the size of the areas and populations to be served and that no party would seek a coverage advantage. *See Order*, FCC 89M-638, released February 24, 1989. The Presiding Judge established February 10, 1989, and March 3, 1989, as the dates for filing Proposed Findings Of Fact And Conclusions Of Law and Reply Proposed Findings Of Fact And Conclusions Of Law, respectively. *See Order*, FCC 88M-2407, released December 8, 1988. Based on a post-hearing amendment by former applicant Buena Suerte, the parties were ordered to file briefs on Buena Suerte's financial qualifications. *See Memorandum Opinion And Order*, FCC 89M-1542, released May 30, 1989. A conference was held on June 20, 1989, and trial briefs were required for a contemplated Phase II hearing on Buena Suerte's financial qualifications. *Order*, FCC 89M-1708, released June 22, 1989. The subsequent voluntary dismissal of Buena Suerte's application mooted the Phase II trial. All parties have timely filed their briefs on proposed findings and conclusions.

4. There are no qualifying issues to consider. Therefore, this decision will consider only the comparative issues in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions of law as well as reasons or basis therefore). The burdens of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C.A §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman v. S.E.C.*, 450 U.S. 91, 101 S.Ct. 999, 1007 (1981). Testimony is cited where practicable by the name of the witness followed by the transcript page number, e.g., "Smith, Tr. 0001." References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

FINDINGS OF FACT

5. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp. v. F.C.C.*, 325 U.S. 327, 333 (1945).

COMPARATIVE ISSUES

Media Diversification

6. Roy E. Henderson ("Henderson") is an individual applicant d/b/a Pueblo Radio Broadcasting Service. Henderson owns and operates an LPTV Station at Clear Lake City, Texas. He also is the licensee of TV Station KASK in Los Cruces, New Mexico and Station KGLF in Freeport, Texas. In his Integration and Diversification Statement filed on May 13, 1988, under the Presiding Judge's Prehearing Conference Order, *supra*, Henderson made a commitment to divest media interests should he receive the grant.[3] But Pueblo failed to amend timely its application to report Henderson's acquisition of KASK-TV, KGLF-FM, and Henderson's award of a construction permit for a New FM station at South Padre Island, TX. The amendment filed on May 13, 1988 was not a timely disclosure and contains no divestiture commitments. (Pueblo Exh. 15.)

7. SCI is an Arizona corporation. All of its voting shares are owned by Anna M. Sanchez ("Sanchez"). Non-voting shares are owned by B. Howard Bernstein ("Bernstein"). Sanchez and Bernstein have no ownership interests in any media of mass communication. Sanchez has committed to resign from her employment at Station KOTV in the event SCI's application is granted.

8. Widsten has no ownership interest in any medium of mass communication.

9. O-V's general partner, Maurico Mendez, has no ownership interest in any medium of mass communication. But Mendez is general manager of a TV station operating on Channel 48 at Galveston, Texas. There is no promise to leave that employment should O-V receive a grant. Mendez is not proposed for integration and therefore he probably intends to retain his position with Channel 48. O-V's limited partner, Jay Zucker ("Zucker"), is a licensee of an FM Translator in Flagstaff, Arizona. Also, through a wholly owned corporation, Zucker is licensee of another FM Translator in Tucson, Arizona.

Comparative Coverage

10. By virtue of the Stipulation of the parties accepted on February 23, 1989 (FCC 89M-638), there are found to be no substantial differences in the areas and populations to be served by the respective proposals of Pueblo, SCI, Widsten and O-V.

Auxiliary Power

11. Pueblo, SCI, Widsten and O-V each proposes to install auxiliary power equipment at the studio and transmitter sites in order to keep the respective proposed stations on-the-air in the event of a local power failure. (Pueblo Exh. 1; SCI Exh. 1; Widsten Exh. 1; O-V Exh. V.)

Standard Comparative Issue

Pueblo

12. The findings of Pueblo's diversification at Para. 6, *supra*, are incorporated here. Pueblo proposes to prosecute its application and conduct its broadcast business through Henderson as an individual. (Pueblo Exh. 1.) Henderson resides in Seabrook, Texas. He proposes to leave his present employment, move to Oro Valley, and serve full-time as the general manager of the Station on Channel 248A. (Pueblo Exh. 1.) Henderson makes no claim of ever residing in the community or in Pueblo's proposed service area. He testified that his mother was a full-blooded Filipino. (Henderson, Tr. 77.)

13. Pueblo through Henderson claims credit for his broadcast experience. Henderson was 50% owner and general manager of Station WKLT-FM at Kalkaska, Michigan during a four year period that ended in 1979. That same year, he moved to Texas City, Texas, where he served as general manager of Station KYST-AM, a broadcast station in which he was an 80% owner. In 1983, he left KYST-AM to become 100% owner and general manager of KLEF-FM, Seabrook, Texas. He testified that he constructed KLEF-FM and that after operating the station for three years he sold it. (Pueblo Exh. 1.) He currently owns and operates a LPTV Station on Channel 5 at Clear Lake City, Texas. He is the licensee of TV Station KASK, Los Cruces, New Mexico and Station KGLF, Freeport, Texas. (Pueblo Exhs. 1, 2 and 15.)

SCI

14. The findings of SCI's diversification at Para. 7, *supra*, are incorporated here. SCI is a corporation organized under the laws of Arizona. It is capitalized with two classes of common stock: voting and non-voting. Corporate documents disclose that the two classes of stock are identical in all material respects, except that the non-voting common stock carries no right to vote for the election of directors or on any other matter presented to the corporation's stockholders for their vote or approval except for matters with respect to which voting rights must be accorded to non-voting stock under Arizona law. (SCI Exh. 1; SCI Exh. 14, SCI Exh. 15.)

15. As of May 8, 1988, Sanchez is the sole holder of SCI's voting common stock. She owns 1,500 shares of SCI's voting stock which represents ownership of 25% of SCI's equity. Bernstein, the sole non-voting shareholder, owns 4,500 shares of SCI's non-voting stock which represents ownership of 75% of SCI's equity. (SCI Exh. 1).

16. The original corporation was to be called "Sanber" standing for Sanchez and Bernstein. (Sanchez, Tr. 744.) SCI filed for incorporation with the Arizona Corporation Commission on September 23, 1986. (Pueblo Exh. 7). Sanchez and Bernstein were the incorporators. (*Id.*) At present, Sanchez is President, Vice-President and a Director of SCI. Sanchez' mother, Bertha B. Sanchez, is Secretary, Treasurer and a Director of SCI. SCI has no other officers or directors. (*Id.*) But documents that were filed with Arizona authorities reflect SCI as having only one class of stock (voting) with Bernstein serving as SCI's Secretary/Treasurer, Director and Incorporator on September 23, 1986, just a few days before the application was filed. (Pueblo Exhs. 6, 7.) Sanchez and Bernstein are alleged by SCI to have agreed at a prior meeting held on August 29, 1986, to set up SCI in its present structure. (Bernstein, Tr. 151-52, 157-58, 179, 206; Sanchez, Tr. 836.) While there is no testimonial evidence that directly rebutted that assertion, there are documentary and testimonial inconsistencies that require its rejection. First, the SCI Articles of Incorporation signed on September 18, 1986, by Bernstein and Sanchez, provide for only one class of stock. (Pueblo Exh. 6.) The description of the stock does not specify "voting" or "non-voting." Bernstein equivocated in his related testimony:

Q. Sir, you have no reason to believe that this referred to any non-voting stock, did you sir?

A. No. I don't - - -.

[Counsel granted leave to allow witness to complete his answer.]

A. I sign corporation papers a lot of times that I don't read them and know what they say. That's all I have to say.

(Bernstein, Tr. 213-14.) Bernstein then attended three meetings of SCI's board of directors and he testified that although recalling that he attended, he does not recall whether or not he voted. (Bernstein, Tr. 216.) Even SCI's corporate bylaws, which were not adopted until May of 1988, make no mention of "voting" or of "non-voting" stock. (Pueblo, Exh. 14.) The bylaws provide in pertinent part:

Voting: At every meeting of the shareholders each shareholder shall be entitled to one vote in person or by proxy for each share of the capital stock having voting power held by such shareholder.

(Pueblo Exh. 14 at p.5.) On cross-examination, Ms. Sanchez admitted that the bylaws referred to voting stock and not to non-voting shareholders. (Sanchez, Tr. 712.) She also testified that SCI's local counsel decided in 1988 that corporate bylaws were needed and that they were not in existence on October 3, 1986, when Sanchez and Bernstein assertedly held the organizational meeting. (*Id.*)

17. SCI's corporate legal work was performed at the inception by Mr. Michael Romano ("Romano"). Romano was Bernstein's counsel. Bernstein recommended Romano to Sanchez:

Q. Was the first local lawyer engaged by Sanchez Communications Michael Romano?

A. Yes, sir.

Q. Had you known him before he was engaged?

A. No, sir.

Q. Would it be correct to state that he was Mr. Bernstein's lawyer?

A. Yes, sir.

(Sanchez, Tr. 748.) In fact, Sanchez retained Romano without interviewing him and Sanchez had not previously used an attorney. (Sanchez, Tr. 765-66.) Bernstein set up the first meeting and it was attended by Sanchez, Romano and Bernstein. (Bernstein, Tr. 267.) When Bernstein moved his own legal business from Romano to new counsel, Mr. Charles King ("King"), SCI decided to drop Romano and hire King. Bernstein testified:

Q. Mrs. Sanchez or Sanchez Communications, has used your new attorney for matters for the corporation, has she not?

A. Yes, sir.

Q. Could you tell us the circumstances in which that occurred?

* * *

A. She called me up, and we were talking, and she says to me that I have a problem with the planning and zoning on the transmitter site. And I said to her, "well why don't you call up my new attorney, Charles King, because he is on the Planning and Zoning Commission of Pima County. And subsequently she called Charles King. She called me back, and she says, "We are going to have a meeting in Mr. King's office." I don't remember the date. But I went to a meeting in Mr. King's office and she discussed it with Mr. King.

(Bernstein, Tr. 193-94.) This evidence establishes that Bernstein controlled the selection of counsel and that Romano and King were simultaneously providing legal advice to Bernstein in his other business activities and in his capacity as a principal in the SCI corporate venture.

18. Through her employment at Western Cities Broadcasting from 1976 to the present, Sanchez had contacts with Western's communications counsel, Mr. David Tillotson. It was Mr. Tillotson who informed Sanchez of the application opportunity in Oro Valley. (Sanchez, Tr. 758.) At that time, she knew Bernstein through her handling of his broadcast advertising account at Western. (Sanchez, Tr. 759.) Bernstein, a financially successful retailer, had placed his advertising through Sanchez at Western for eight years.

(Sanchez, Tr. 762-63.) Sanchez contacted Bernstein about his investing in the venture for the Oro Valley station. (Sanchez, Tr. 764.)

19. In addition to furnishing local counsel for the venture, Bernstein held a partnership interest in the land selected by SCI for its tower site. (Bernstein, Tr. 192.) Bernstein suggested to Sanchez that she contact the property manager and gave her the manager's name. (Sanchez, Tr. 747.) Sanchez testified that she worked on the site selection solely through Mr. Dawson, an engineer who had been recommended to Sanchez by Mr. Tillotson. (Sanchez, Tr. 839.) Sanchez testified that she sent Dawson a map of the area and that in a subsequent telephone call he gave her "boundaries to follow." (*Id.*) Sanchez went out several weekends to look at land and encountered various problems with structures. (Sanchez Tr. 840.)

I looked and I looked and had some stuff pinpointed, but there were a number of problems with the ones I had found.

> I had asked someone to drive out with me and help me look for a piece of land, and I told them where it was and where we needed to start, and it just happened that this piece of land was owned by a partnership that Howard [Bernstein] belonged to.
>
> And when I called Mr. Dawson and told him where it was, what he (sic) was, and he looked into everything, it was perfect.

(Sanchez, Tr. 840.) Sanchez went on to explain that Mr. Mike Cutchall, a person with whom she worked at Western, had driven her around to look at properties and when Sanchez showed him the boundaries that Dawson had selected, he (Cutchall) told her he believed that Bernstein was a part owner of the land. She then called Bernstein who provided the manager's name. (Sanchez, Tr. 841.)

20. Under the circumstances, this factual account does not ring true. Sanchez had been dealing with Bernstein for eight years. They were co-incorporators and shared the same local counsel. Bernstein was also putting up the "seed money." It simply defies reason that he would leave Sanchez in the dark about his real estate holding in Oro Valley when both knew that a site was needed. It is an incredible circuitous route of discovery of Bernstein's land through Dawson who was reviewing maps with Sanchez over-the-phone. It is equally significant that neither Dawson, nor Mike Cutchall, nor the land manager were produced by Sanchez as witnesses. In the face of the absence of three disinterested witnesses having first-hand knowledge, I find that Bernstein must have told Sanchez about his Oro Valley land and that she did not learn of the site for the first time from Mr. Dawson (location) and Mr. Cutchall (Bernstein's ownership).

21. Bernstein has made separate loans to SCI in amounts of $30,000 and $50,000. (Sanchez, Tr. 736-37.) He has sent at least one check directly to Mr. Tillotson for SCI's legal expenses. (Bernstein, Tr. 738-39.) He has authority to draw checks on SCI's checking account. His signature appears on the account card (Pueblo Exh. 5) and he has signed corporate checks on a "few occasions." (Bernstein, Tr. 190, 202.) It was Bernstein who opened the original "Sanber" bank account in 1986, with an initial deposit of $1,000. (Sanchez, Tr. 744; Bernstein, Tr. 197, 200.) He personally wrote one check on that account in the amount of $500. The remaining $500 was left to start SCI's account in 1987. (Bernstein, Tr. 200.) The business address of Mr. Bernstein was originally listed on the bank account record. (Bernstein, Tr. 203.) The checks which Mr. Bernstein wrote were either sent to the payee or to Sanchez and most of the checks signed by Mr. Bernstein were sent to SCI's Washington counsel. (Bernstein, Tr. 205, 206.) Thus, the evidence establishes that Bernstein has exercised substantial control over SCI's corporate bank account.

22. The evidence also discloses that Bernstein was instrumental in the financial certification process for SCI. Sanchez certified to SCI's financial capability on September 29, 1986. (Pueblo Exh. 13.) At that time, she had a letter from 1st Interstate Bank dated September 29, 1986, addressed to Bernstein. The letter references "Sanchez Communications" and stated that Bernstein has in excess of [$ masked amount] in available funds. The letter notes Bernstein's 10 year banking relationship with 1st Interstate Bank and states that "we would be interested in assisting with any financing should the need arise." (Pueblo Exh. 10.) But at the time of certification, Sanchez had no written commitment from the bank that was addressed to Sanchez or to SCI. The reference to Sanchez Communications in the bank letter only acknowledges the use intended for the funds by Bernstein. But the letter clearly extends the invitation for funding to Bernstein personally. Nor is there any document that evidences any commitment for funding from Bernstein to SCI. Sanchez did not ask to see Bernstein's balance sheet. (Sanchez, Tr. 735.) This evidence supports the conclusion that Sanchez was blindly relying on Bernstein to produce the funds and the same day letter from a bank that was addressed personally to Bernstein constitutes substantial evidence of Bernstein's control over the proposal's financing.

23. There was a belated attempt to paper over the organizational defects in SCI's proposal. Specifically, a "Stockholders Agreement" with a so-called "effective date" of August 27, 1986, was executed by Sanchez and Bernstein on May 9, 1988. (Sanchez Exh. 6.) The document purports to contemplate that Sanchez is in control of the application and that Bernstein will be responsible for obtaining the necessary financing. But management control is not absolutely delegated to Sanchez. The document provides:

> Notwithstanding the fact that Sanchez shall have the sole and exclusive right to operate the Corporation's business, Bernstein shall be allowed to be a signatory to the Corporation's bank account in the event Sanchez is unable or unavailable to issue checks of the Corporation in a situation where the issuance of checks is necessary for the Corporation's business.

(Sanchez Exh. 6 at p. 3.) It is inconsistent as a factual finding for Bernstein to reserve such control over SCI's disbursement of funds while representing that he is not involved in management and control.

24. There are additional facts relevant to finding the extent of Bernstein's control. The Stockholders Agreement further provides:

> As soon as reasonably possible after the FCC Application is granted, the Corporation shall submit to Bernstein a proposed budget for the use of the $150,000 of funds along with a time table of when such funds will be needed. Bernstein shall review such use and time table for the funds and a mutually agreeable disbursement schedule shall be agreed upon and reduced to writing.

(Sanchez Exh. 6 at p.3.) This writing evidences Bernstein's control over the disbursement of funds for the station's construction and operation. Through the review process, Bernstein can accept or reject line-item expenditures by his power to deny a "mutually agreeable disbursement schedule." (*Id.*) Additional indicia of the control reserved to Bernstein is further evidenced in other portions of the same document. For example, Bernstein has veto power over any decision on the part of Sanchez to sell, pledge or encumber SCI's assets, to issue additional stock of any type or class, or to pay herself a salary that exceeds one normally paid by a station with "comparable facilities." (Sanchez Exh. 6 at p. 5.) These restric-

tions would severely limit Sanchez's ability to raise additional capital for plant expansion, to bring in new investors if Bernstein's assets were unavailable (*e.g.* bankruptcy), and effectively places the amount of Sanchez's salary at the whim of Bernstein. Such restrictions are totally inconsistent as a factual finding with the independence of a corporate shareholder having a majority of voting control. Finally, if Sanchez wants to sell her voting stock, Bernstein has a right of first refusal and a right to insist that all of his non-voting shares be sold in the same transaction. (Sanchez Exh. 6 at p. 7.) Such a limitation on Sanchez's right to dispose of her stock further limits Sanchez's rights as a voting shareholder. And the pairing of Sanchez's voting stock with Bernstein's non-voting stock in any sale permits Bernstein to select the purchasers.

25. Other relevant facts urged by SCI are those relating to Sanchez's participation in the prosecution of SCI's application. The initial contact between Sanchez and Bernstein regarding the Oro Valley venture occurred in early 1986. Sanchez approached Bernstein and discussion centered on Bernstein's investment in the project and whether Bernstein's wife or Bernstein himself would participate as equity owners. (Bernstein, Tr. 146-47; Sanchez, Tr. 764, 785-86.) Bernstein could not recall the purpose for writing SCI's first check for $500 or the name of the payee. (Bernstein, Tr. 199.) There were no substantive discussions between Bernstein and Sanchez concerning SCI's proposed legal structure and capitalization until August 29, 1986, on which date Bernstein and Sanchez met in Romano's law office to discuss terms of SCI's structure. (Bernstein, Tr. 149-50, 195-96; Sanchez, Tr. 789.) But there is insufficient evidence to establish as a fact that Sanchez would have gone forward with the application process if Bernstein was unwilling to participate. (*See* and *Compare* SCI's PFC at 9-10.)

26. The evidence relied on by SCI that Sanchez took the lead on technical matters essential to the prosecution of SCI's application is considered. Specifically, she discussed the procedures under application Form 301 with Mr. Tillotson, she hired an engineer and discussed site suitability with him, she prepared construction estimates, gathered information for EEO disclosure, selected the transmitter site on Bernstein's land, reviewed, discussed changes and made corrections to Form 301, and she executed the application form on behalf of SCI. (*See* SCI's PFC at 9-10.) SCI also seeks a finding that Sanchez arranged the meeting with Romano. (*Id.*) But the totality of the evidence, particularly in view of the former and continued Bernstein-Romano connection, supports only a finding that Sanchez made the phone call to set up a time and date convenient to all attendees.

27. SCI seeks a further finding that "Sanchez came to the meeting with a plan for how she wanted to structure the applicant corporation." (*See* SCI's PFC at 10-11.) But the evidence does not support such a finding. First, the only testimony of Sanchez cited in support is one page that is inconclusive:

> Q. Did someone bring some ideas to that meeting?
>
> A. I came to the meeting with different things that you (Mr. Tillotson) had requested that I speak to Mr. Romano about as far as what I needed for my application.

(Sanchez, Tr. 836.)[4] That testimony of Ms. Sanchez was not developed any further on re-direct. The possible meanings are multiple. Mr. Tillotson may have outlined with her the terms that she and Bernstein had in mind. In view of the multiple provisions in the subsequent Stockholders Agreement that are so protective of Bernstein's interests (Sanchez Exh. 6), it would be incongruous to find that Sanchez proferred those terms to Romano at the August 29th meeting and that she was advised to volunteer those provisions by Mr. Tillotson who was serving as counsel to protect her interests. It is more readily established by the credible evidence that Romano laid out the terms which were more favorable to Bernstein and assumedly necessary as a condition for Bernstein to arrange financing. Even Ms. Sanchez was aware at the meeting that Romano was "representing Mr. Bernstein's direct interests personally." (Sanchez, Tr. 836.) But there was no one present at that meeting, at which SCI contends that a final structure was formulated, to represent Ms. Sanchez personally. And there is further circumstantial evidence that Mr. Bernstein and Mr. Romano were directing the meeting, for Mr. Romano wrote down the terms on notepaper that counsel for SCI sought to introduce as evidence. *See* Rejected SCI Exh. 4 considered here solely for the fact that it was prepared by Romano and sponsored by SCI and not for the truth of the matters asserted therein.)[5] Thus, the findings sought by SCI at its PFC Para. 23 are rejected. The terms of how SCI were to be structured are established under the Stockholders Agreement that was executed, after-the-fact, on May 9, 1988. (Sanchez Exh. 6.)

28. Also rejected is the related proposed finding:

> Although Sanchez and Bernstein agreed at the August 29, 1986 meeting to set up SCI with voting and nonvoting stock, SCI's original articles of incorporation which were filed with the Secretary of State of Arizona on September 23, 1986, only provided for a single class of voting common stock.

(*See* SCI PFC at p. 12.) As indicated above, the credible evidence establishes May 9, 1988, as the date when SCI's structure was finally set. The conclusion reached that on August 29, 1986, there was only one class of stock intended, which would be voting stock, is further supported by the next finding sought by SCI that the reason for disclosing only one class of stock was in furtherance of SCI's admission that "Romano, who was Bernstein's attorney, wanted to make sure that Bernstein's interests were protected until the formal agreement - - - was written up and executed." (SCI PFC at p. 12; Bernstein, Tr. 166.) Thus, it is concluded based on SCI's own analysis that when Sanchez and Bernstein met with Romano, it was Bernstein's interests that were being protected by Romano and at that time, Bernstein was intended to have formal voting power over SCI decisions until Bernstein and Romano were satisfied that a shareholders agreement "was written up and executed" that would create adequate control for Bernstein as set forth in Sanchez Exh. 6.

29. SCI's application Form 301 that Ms. Sanchez executed on September 29, 1986, three days after it was disclosed to the Arizona Corporation Commission that there was only one class of stock (Pueblo Exh. 6), erroneously disclosed that there were two classes of stock: voting and nonvoting. (Pueblo Exh. 13.) Also, on the date SCI filed its application Bernstein was represented to Arizona as a director and an incorporator. (Pueblo Exh. 6.) Thus, the converse to the disclosure of directors in Form 301 was not accurate on September 29, 1986, because Bernstein was not disclosed as a director.

30. Nor was SCI's Form 301 any more accurate in those respects when it was filed at the Commission on October 2, 1986. On October 3, 1986, the day following the filing of Form 301, Sanchez and Bernstein met with Romano. Ms. Sanchez's mother, Bertha, also attended that meeting. There, Bernstein was recorded present at the meeting as a "director." The first order of business was to accept the resignation of Bernstein as officer and director. (Sanchez Exh. 5.) Bertha Sanchez was not recorded as a director although she was disclosed as a director on Form 301. (Pueblo Exh. 13.) Also, Sanchez was specifically authorized to prosecute SCI's application and Sanchez and Bernstein offered to purchase their stock interests. (Sanchez Exh. 5; Bernstein, Tr. 169, 171; Sanchez, Tr. 708-709, 814-818.) But the evidence establishes that the minutes of this October 3, 1986 meeting were not signed by Sanchez until May 8, 1988. (Sanchez, Tr. 707.) On the same day, the minutes were prepared by Romano and reviewed with Sanchez who made no corrections. (Sanchez, Tr. 709.)

31. Documents relating to corporate actions taken at the post-filing meeting of October 3, 1989. were not forthcoming until May 9, 1988. Sanchez testif d that she did not persevere with Romano for the documents because she did not appreciate their significance. She testified as follows:

> I called him [Romano] a few times, and I obviously didn't push hard enough, and [it was] not until May of § 88 [that] I needed those papers to give to everyone. I should have asked for them before and I didn't. I did ask, I didn't push it, and he never gave me any paperwork to sign until May of 1988.

(Sanchez, Tr. 820.) Also, although Bernstein denies that he did not push Romano for the SCI documents, he testified that in January of 1988 and thereafter he did call Romano for documents in other legal matters relating to Bernstein's business. (Bernstein, Tr. 180.) Notwithstanding that attempted hedge, it is found that Bernstein, not Sanchez, was responsible for getting Romano to prepare and deliver the SCI documents. First, Bernstein testified that it was around this time that he fired Romano and hired King. Recall that Sanchez took the same action. Second, it is unreasonable to accept Bernstein's testimony that he would push Romano for legal work to the point of firing him for failing to produce timely documents, and yet say nothing to him about SCI documents. (Bernstein, Tr. 180.) It was Bernstein who recommended Romano and it was Bernstein who was putting up the seed money. Sanchez testified she was not pushing Romano for the documents, yet they materialized about the same time that Bernstein was leaning hard for results. Finally, Romano has first hand knowledge of the facts and SCI did not subpoena his testimony. Therefore, for these reasons it is found that Sanchez was not in control of Romano's legal work but Bernstein was in control as a matter of fact.

32. The following documents were turned over to Sanchez by Romano on or about May 9, 1988:

> (i) Minutes of the organizational meeting of the shareholders and directors of SCI that was held on October 3, 1986 (SCI Exh. 5);
>
> (ii) Minutes of a special meeting of the shareholders of SCI held May 9, 1988 for the purpose of amending its articles of incorporation and bylaws to reflect that the corporation was authorized to issue two classes of common stock, one which carried voting rights and one which did not (SCI Exh. 7);
>
> (iii)Amendment to the articles of incorporation of SCI authorizing the corporation to issue two classes of common stock, voting and non-voting (Pueblo Exh. 8);
>
> (iv) Amendment to the bylaws of SCI setting out the distinctions between the corporation's voting and non-voting stock (SCI Exh. 13); and
>
> (v) Minutes of SCI's annual shareholders and directors meetings dated September 9, 1987 (SCI Exhs. 8, 9).

SCI acknowledges that formal meetings were not held on the dates recited above: October 3, 1986; September 9, 1987; and May 9, 1988. (*See* SCI's PFC at 14-15 n. 4.)

33. SCI offers corroborating record evidence of the assertions made through the testimony of Sanchez and Bernstein that the documents prepared by Romano on May 8, 1988, reflect the actions taken at the meeting of October 3, 1986:

> (i) The signature card for SCI's corporate checking account which reflects that when that account was opened on March 9, 1987, the bank was advised that Bernstein was a "non officer" and "non owner." (Pueblo Exh. 5) These notations on the signature card were made by the bank officer who opened the account based upon what she was told regarding Bernstein's relationship with the corporation. (Sanchez, Tr. 833-34.)
>
> (ii) SCI's 1987 Annual Report to the State of Arizona which was executed by Sanchez on June 10, 1987 and was filed with the Secretary of State of Arizona on June 15, 1987 lists Sanchez and her mother as the sole officers and directors of SCI (SCI Exh. 14).
>
> (iii) The form bylaws which were reviewed at the October 3, 1986 organizational meeting of SCI and approved as SCI's bylaws contain a specific provision addressing the fact that some of the corporation's stock would bear voting rights and some would not. (Pueblo Exh. 14, para. 8.)

The hearsay nature of the evidence concerning what the meaning of bank employee notations might be is too speculative to accept as substantial evidence tending to prove a fact in issue, particularly where there is

conflicting evidence. The 1987 annual report may have tracked the erroneous disclosure in SCI's Form 301. It does not overcome the clear evidence that corporate documents that were necessary to effect corporate action were not prepared until May 9, 1988. There was no evidence introduced by SCI to support the conclusion that the form bylaws were in fact reviewed by Sanchez with counsel on October 3, 1986, or at anytime thereafter. Also, of equal significance is the failure on the part of SCI to produce Romano as a witness (or attempt by subpoena to obtain his testimony) to these facts as to which he has first-hand knowledge.

34. SCI offers as corroborating evidence for the testimony of Sanchez and Bernstein concerning their assertions that they always intended Sanchez to be sole voting stockholer of SCI and Bernstein to be a passive investor, the notes of the August 29, 1986 meeting in Romano's office which were prepared by Romano at the time of the meeting. SCI carries forward its exception to the Presiding Judge's rulings prohibiting Sanchez and Bernstein from using Romano's notes to refresh their recollection concerning the matters discussed and agreed to at the August 29, 1986 meeting. The Presiding Judge stands by his bench rulings (Tr. 154-56 and Tr. 159-60) and notes the unreliable hearsay nature of such self-serving evidence and the failure to produce the author for cross-examination.

SCI's Comparative Quantitative and Qualitative Proposal

35. Sanchez currently resides in Tucson, Arizona. She proposes to resign from her employment if SCI's application is granted. She will serve as full-time general manager of SCI's Oro Valley FM station where she will work at least 40 hours per week in performing all of the functions typically performed by a general manager of a radio station including, the hiring and firing of employees, the establishment and implementation of the station's program format, the development and implementation of the station's public service programming, sales promotions, and general administration. (SCI Exh. 2.)

36. Sanchez has lived all of her life in Tucson, Arizona which is within the primary service area of SCI's proposed station. (SCI Exh. 2; Joint Engineering Exhibit, SCI coverage map.) If SCI's application is granted, she will relocate her residence to Oro Valley. (SCI Exh. 2.)

37. From 1982 to the present, Sanchez has been the organizer of Tucson Broadcasters Association's annual Toys for Tots drive. In this capacity, she has coordinated the efforts of the sponsoring organizations, and local radio and television stations. During November and December of each year, Sanchez devotes approximately 10 hours per week to organizing the drive. Additionally, in the fall of each year she participates in at least four major planning meetings for the drive and each January she participates in a follow-up meeting. The balance of the year she devotes a couple of hours each month to planning the next Toys for Tots drive. From May, 1987 to October, 1988, Sanchez worked with the Red Cross and the March of Dimes promoting the activities, needs and achievements of these organizations. Since the Summer of 1988, she has assisted the local chapter of the American Red Cross in fund raising and since October, 1988, she has been a member of the advisory board of the local chapter of the American Cancer Society. (SCI Exh. 2.)

38. Sanchez is entitled to integration enhancement credit based on the facts that she is female and that she is of Hispanic (Mexican) descent and heritage. (SCI Exh. 2.)

39. Sanchez has worked full-time in broadcasting in the Tucson market since 1976. The positions that she has held are:

Stations KRQQ (FM) and KNST (AM), Tucson, Arizona:

Receptionist, 1977 - 1979.

Sales Assistant, 1979 - 1980 (responsibilities included writing orders for commercials, working with advertisers in developing sales promotions, and negotiating rates and dealing with the station's national sales representative).

Administrative Assistant to the General Manager, 1980 - 1986. In this position Sanchez was directly involved on a daily basis in all aspects of station operations. Her responsibilities included attending all senior staff meetings, keeping minutes of those meetings and following-up with department heads to make sure that decisions were implemented.

Station KDTU - TV, Tucson, Arizona

Promotion Assistant, May, 1987 - April, 1988. In this position, Sanchez purchased time for advertising on radio and in other media to promote KDTU-TV and its programming.

Promotion Manager, April 1988 - present. As the promotion manager at KDTU-TV, Sanchez continued to discharge the same responsibilities at the station that she had discharged as Promotion Assistant; however, in addition to these duties, she also assumed overall responsibility for the management of the station's promotions department.

Executive Producer of a daily two-hour children's television program, "The Friendship Club," May, 1987 - present. In this position, Sanchez was responsible for putting together all aspects of the program.

(SCI Exh. 2; Sanchez, Tr. 772, 774-76).

Widsten

40. Hal S. Widsten is an individual applicant. (Widsten Exh. 1.) He does not propose to be integrated into the management of the Oro Valley FM station that is in issue in this case. (*Id.*)

O-V Communications

41. O-V is a limited partnership with one general partner, Mauricio D. Mendez, a Hispanic who owns 20 percent of the equity in the partnership. (O-V Exh. 1.) There is one limited partner, Jay S. Zucker, who owns 80 percent of the equity in the partnership. (*Id.*) O-V proposes no integration in this case. (O-V Exh. 3.)

CONCLUSIONS OF LAW

42. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings,* 1 F.C.C. 2d 393 (1965).

43. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communication, or diversification, and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F.C.C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984) (process of comparative evaluation). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership into management which may be enhanced by local residence, civic activities, broadcast experience and, if applicable, minority and female gender preferences. *Id.* There are no basic qualifying issues to consider. But the *bona fides* of SCI's integration proposal has been challenged and will be considered. *Compare N. E. O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986) (non-owner husband found to control 100% owner wife in all decisions and therefore applicant not credited with integration).

Diversification

44. Maximum diffusion of control of the media of mass communication is a factor of primary significance in the comparative adjudication process. *See Policy Statement, supra* at 394. SCI and Widsten own no media interests. As a result, none of those applicants will be assessed a diversification demerit. But O-V's general partner, Mendez, is general manager of a TV station and he intends to retain that position. Pueblo's principal, Henderson, owns broadcast interests that are considered for diversification. For those reasons, Pueblo and O-V receive diversification demerits and SCI and Widsten will qualify for corresponding diversification preferences over Pueblo and O-V.

Pueblo's Diversification Demerit

45. Henderson, Pueblo's principal, was found to be the owner of Station KASK(TV) Las Cruces, NM in October 1987, and Station KGLF-FM (Freeport, TX) in November 1987, respectively. Henderson first reported the acquisition of those interests in Pueblo's Integration and Diversification Statement (" DS") that was filed on May 13, 1988, under the Pres iding Judge's *Prehearing Conference Order, supra*. The Commission's rules require that an amendment to report such decisionally significant events as the acquisition of broadcast stations be made by appropriate amendment within 30 days of the event. 47 C.F.R. §1.65(a). Henderson's acquisition of the KASK and KGLF broadcast interests were decisionally significant events under the Commission's policy. *Policy Statement*, supra at 395. Therefore, Pueblo failed in its reporting obligations and it cannot cure the error by disclosure ordered by a trial judge six to seven months after the reportable event. To allow Pueblo to effect such a cure would result in permitting an unauthorized upgrading that is prohibited by the Commission. *See Alexander S. Klein, Jr.*, 86 F.C.C. 2d 423, 426 (Comm'n 1986); *Daytona Broadcasting Co., Inc.*, 97 F.C.C. 2nd 212, 214-19 (Review Bd 1984). *Compare Richard P. Bott, II*, 4 F.C.C. 2d 4924, Review Bd Slip Op FCC 89R-32, released June 5, 1989, at Paras. 18-19 (voluntary divestiture after "B" cut-off will not permit a comparative upgrade).

46. The cut-off date for perfecting amendments in this case had been established as December 15, 1986. *See Public Notice* (Report No. 13777), November 11, 1986 (Official Notice). Clearly, Pueblo missed the deadline. Pueblo now relies on the disclosure in Pueblo's application (Sanchez Exh. 3), disclosure in the May 13, 1988 IDS, disclosure in a proposed amendment dated May 13, 1988 (Pueblo Exh. 15) and disclosure in trial exhibits that were exchanged on November 14, 1988. The only disclosure that would be timely was the disclosure in the application that was filed on October 2, 1986, but for the fact that the reportable event had not yet occurred. Also, while there was mention made in the application that "Mr. Henderson will divest of his interests in KLEF-FM," there is no unconditional pledge to divest of later-acquired broadcast interests. (Sanchez Exh. 3.) Thus, the law requires that Pueblo receive a divestiture demerit for Henderson's ownership interests in KASK(TV) and KGLF-FM.

47. The opposing parties also urge that Pueblo receive an additional diversification demerit for Henderson's ownership of a construction permit for an FM station at South Padre Island, Texas which he acquired in August 1988. (*See* SCI PFC at 35.) Pueblo had filed and exchanged its IDS on May 13, 1988, wherein there was an unequivocal promise to divest all broadcast interests.[6] But the South Padre Island permit was acquired after the exchange of IDS and Pueblo failed to file an amendment disclosing the acquisition within 30 days of the event as it was required to do under §1.65(a). The first post-acquisition disclosure of South Padre Island was made by Henderson in open court. (Henderson, Tr. 80-81.) Such patchwork disclosure does not meet the prescribed standard and procedure for timely disclosure through amendment that is required under §1.65. In fact, the South Padre Island construction permit was not even disclosed in the written testimony that was exchanged on November 14, 1988. (Pueblo Exh. 2.) Since it was brought out on direct testimony there is no inference that there was a purposeful non-disclosure. (Henderson, Tr. 80-81.) But the evidence fails to show cause for not complying timely under prescribed procedures. *See Martin Intermart, Inc.*, 3 F.C.C. 1650, 1651 (Review Bd 1988) (post "B" cut-off divestiture pledges rejected as untimely made). *See also Mark L. Wodlinger*, 3 F.C.C. 2d 3139, 3141 (Review Bd 1988) (divestiture pledge must be contemporaneous with post "B" acquisition of chargeable media interest). Therefore, Pueblo also receives an additional diversification demerit for its unreported acquisition in August 1988 of the construction permit for a broadcast facility in South Padre Island, Texas.

48. As to the remaining media interests disclosed at various times by Pueblo, these are of *de minimis* importance in view of the substantial diversification demerits already assessed against Pueblo. Pueblo disclosed in its application that Henderson was licensee and general manager of Station KLEF-FM at Seabrook, Texas. He timely committed to divest that interest and resign that position. (Sanchez Exh. 3.) Therefore, Pueblo receives no demerit for Station KLEF. Pueblo also disclosed in its Form 301 the then pending applications for permits at Kerman, CA, Central Valley, CA and South Padre Island, Texas. There

was no commitment to divest any of those three applications for construction permits. But there was then no duty to commit to divest them. Pueblo also committed in its Form 301 to divest Henderson's interest in an LPTV Station in Clear Lake, Texas. (*Id.*) That commitment was timely. Also, interests in LPTVs that are at substantial distances from the community of license are deemed to be *de minimis* for diversification purposes. *See Mark L. Wodlinger*, 101 F.C.C. 2d 762, 769 (Review Bd 1985). Later, on May 13, 1988, Pueblo disclosed other media interests owned by Henderson: application for new FM station at Caldwell, TX; application for new FM station at Liberty, TX; KASK-TV purchased October 5, 1987; licensee of commercial broadcast Station KGLF-FM at Freeport, TX; licensee of LPTV at Clear Lake City, TX; and licensee of KLEF-FM until July 1, 1987 when that station was sold. (Integration and Diversification Statement officially noticed.) On November 14, 1988, Pueblo exchanged Henderson's sworn written testimony that disclosed substantially the matters disclosed in the IDS. In Henderson's live testimony of December 1, 1988, he disclosed an application for a new FM station at Mason, TX that was filed with the Commission on October 27, 1989, and an award of the construction permit at South Padre Island, TX discussed above. (Henderson, Tr. 80-81.) These interests have been accounted for in the diversification analysis which supports the conclusion that SCI and Widsten will each receive a slight to moderate diversification preference over Pueblo. *Richard P. Bott, II, supra.*[7]

O-V's Diversification Demerit

49. Although O-V owns no media interests either directly or through its principals, the general partner, Mr. Mendez, is the general partner of a TV station in Galveston, Texas. Mendez has not committed to leave that position should O-V receive the grant in this case. While the evidence does not show that Mendez exercises or shares in the control of the Galveston broadcast facility, the position of general manager which he will retain is sufficient to conclude that O-V qualifies for a diversification demerit. *Policy Statement*, *supra* at 394 n. 5 (significant managerial positions in stations within and without the service area will be considered when held by persons with any ownership interest in an applicant). While the demerit assessed against O-V is less than the demerit assessed against Pueblo, it nonetheless provides SCI and Widsten with diversification preferences over O-V.[8]

Integration Proposals

Pueblo

50. Pueblo has filed a timely integration proposal. The evidence introduced by Pueblo shows by a preponderance of the evidence that Henderson will be the full-time manager, that Henderson qualifies for a qualitative enhancement for his significant broadcast experience, that Henderson qualifies for a minority preference, that Henderson and Pueblo seek no comparative credit for local residence or local civic involvement, and that Henderson will leave his present employment and move to Oro Valley to manage the station. *See* Findings *supra* at Paras. 6, 12-13.

SCI

51. But for the evidence of Bernstein's control over the application process, SCI would qualify for the full-time integration of Ms. Sanchez and would receive enhancement credits for her residence in the service area, her involvement in local civic affairs, her minority status, and her gender. She also would receive a slight enhancement credit for her experience in broadcasting, most of which involved clerical related duties. *See* Findings, *supra* at Paras. 35-39.

52. However, the findings made above at Paras. 16-34 establish control in Bernstein to such a degree that there will be no credit awarded for SCI's integration. *Doylan Fortney, et al.*, 3 F.C.C. Rcd 6330, 6331-32 (Review Bd 1988). Stated alternatively, SCI has the burden of proof to show by a preponderance of the evidence that Ms. Sanchez has controlled the application process from its inception. *TeleStar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987), citing *Steadman* v. *S.E.C.*, *supra*. SCI has failed to meet its burden. The analysis of the evidence to support these conclusions are made below.

53. Ms. Sanchez decided in late 1985 that she was going to apply for Channel 248A. She would need financial assistance and she knew Mr. Bernstein as an established business person with whom she had an eight year business relationship. She approached Bernstein with the opportunity for him to join her as an investor. He agreed. But then he took steps to assure that he was in control of the business at the application stage, after construction and through its broadcast operations. Bernstein chose his own local corporate attorney to incorporate the venture which he initially planned to call "Sanber," a name that would recognize Ms. Sanchez and Mrs. Bernstein as the first-tier principals. On September 18, 1986, the company's Articles of Incorporation, signed by Sanchez and Bernstein, were prepared by Mr. Romano, Bernstein's attorney. The document reflects that Sanchez and Bernstein were the incorporators and that there was only one class of stock. While Bernstein sought to create the impression in his testimony that he was not sure it was voting stock, the evidence establishes that it was voting stock and that Bernstein intended it to be voting stock. *See* Findings, *supra* at Para. 16. And documents filed with Arizona state authorities on September 23, 1986, shortly before the application was filed, reported SCI as having one class of stock (voting) with Bernstein serving as SCI's Secretary/Treasurer, Director and Incorporator. *Id.* SCI admits the structure was set that way in order to give Bernstein the control he needed to protect his investment:

> - - - the Articles of Incorporation were filed with only a single class of stock because Michael Romano, who is Bernstein's attorney, wanted to make sure that Bernstein's interests were protected until the formal agreement setting out the specific provisions designed to protect Bernstein's investment was prepared and executed.

See SCI's RPFC at 8-9. The power of Bernstein to dictate the corporation's structure through his own attorney in order to protect his own business interests is strong evidence of Bernstein's control. *See Rogers* v. *Hill*, 289 U.S. 582 (1933) (power to prescribe rules for the government of business corporations is deemed incident of ownership and voting power). The fact that Bernstein was able to exercise such extensive control on September 26, 1989, is a further basis for rejecting the proposed finding that the present corporate structure, in which Ms. Sanchez has the voting stock, was agreed to by all parties at the meeting with Mr. Romano on August 27, 1986. The more credible account is the realization by Bernstein in May 1988 that corporate papers needed to be prepared to document the appearance of Ms. Sanchez's control.

54. There is further substantial evidence of Bernstein's control over SCI's application process. He made loans to SCI totalling $80,000. To control, or at least monitor, the disbursements of those funds, he opened SCI's checking accounts and he reserved check writing privileges for himself. He wrote at least one check. SCI argues that Bernstein opened the accounts in order to enable Sanchez to pay initial expenses and to permit Bernstein to write checks for SCI when Sanchez was out of town. *See* SCI's RPFC at 14 and 14 n. 4. But there is no explanation offered why Ms. Sanchez could not have opened the accounts and used her mother as a backup authorized signatory in the event Ms. Sanchez was out of town. In fact it is significant that Ms. Sanchez's mother, the proposed Secretary and Treasurer of the corporation, is not authorized to issue checks for SCI. The more reasonable inference to draw is that Bernstein wanted to be in a position to oversee how his loans were being spent. He had sufficient power and control to have himself on the checking account. And as signatory he would always have access to bank statements by merely presenting himself at the bank. Sanchez knew she was being watched and would act accordingly.

55. Another indicia of control are the selection of an antenna site in which Bernstein had an ownership interest. Certainly a broadcaster desires a stabile arrangement with a landowner. By locating the antenna on Bernstein's land, SCI achieves a stabile relationship and he receives two benefits: First, SCI will pay him a rental fee which increases the economic return on his land. Second, Bernstein has an additional means to control SCI's business in that SCI must rely on Bernstein for its site. SCI sought through testimony of its principals to show that the selection of Bernstein's land by the engineer was a fortiutous event. But as found above at Paras. 19-20, that account is rejected so being implausible under the circumstances.

56. Another significant fact illustrating control by Bernstein are certain operative provisions of the Stockholders Agreement of May 9, 1988. As indicated above, SCI concedes that Bernstein's attorney first structured the proposal to give Bernstein voting control until an agreement was finalized. The Stockholders Agreement, executed almost 21 months after SCI claims that terms were agreed to, effectively confers on Bernstein control over SCI's business affairs which are substantially equivalent to voting control. Under the agreement, Bernstein remains a signatory on the checking account thereby giving him access to bank statements. Bernstein also has approval rights over SCI's operating budget which effectively gives him the power to veto proposed expenditures with which he does not agree. Bernstein even has the power to limit the issuance of additional stock and the amount of Ms. Sanchez's salary.

57. In *Doylan Fortney*, *supra*, a limited partnership and a corporation were organized by counsel who took limited partnership and non-voting stock interests and who actively involved themselves in decisions of the applicants. In the case of the corporate applicant the Review Board held:

> Exhibits [received in evidence] show his [counsel's] central role in structuring of the corporation. Applying the Commission's policy views, we hold that these interests cannot be deemed passive, they must be attributed, and therefore substantially reduce [the] maximum integration credit.

3 F.C.C. Rcd at 6332. In that case, the equity owners were the attorneys who structured the ventures. Here it is Romano, Bernstein's attorney, who structured the venture in Bernstein's interest. Therefore, Sanchez is integrated under Bernstein's control and Sanchez's claimed integration credit is lost.

58. The burden is on SCI the applicant to prove that it is entitled to all the integration credit that it claims. *See TeleStar, Inc., supra*. In view of the evidence establishing Bernstein's control, SCI has failed to show it is entitled to 100% credit for Ms. Sanchez. *See Hispanic Owners, Inc.*, 99 F.C.C. 2d 1180 (Review Bd 1985). The law requires SCI to provide evidence of a reasonable assurance that its integration will be carried out. *Bradley, Hand & Triplett*, 89 F.C.C. 2d 657, 662 (Review Bd 1982). This SCI has failed to do for Ms. Sanchez will not have full control over budget, her salary, or the infusion of new capital for expansion. She will merely share control with Bernstein. Bernstein also will have the power to inspect bank statements at the bank at anytime without Sanchez' knowledge or consent. Also, Bernstein has control over the land on which SCI will place its antenna. And Bernstein has residual rights in the voting stock if Ms. Sanchez leaves the company. Finally, Ms. Sanchez will be operating under a corporate structure that was put in place by Bernstein. Under these circumstance there is no reasonable assurance that Sanchez will be integrated except under Bernstein's control. It is recognized tht Ms. Sanchez has performed essential tasks on behalf of the venture such as working with counsel on selecting an engineer, construction estimates, EEO disclosures, issuance of routine checks, visiting the antenna site and executing the application. However, these are tasks which she could do with the assistance of communications counsel. These acts do not require sole control over the business. But when it became necessary to effect a zoning variance, Bernstein obtained new counsel to do the work and Sanchez did not consider any alternatives. Because of Bernstein's integral role in dictating key terms in the controlling documents, in selecting local counsel, in obtaining the financing and

in providing land for an antenna site, there will be no integration credit awarded. *See Washoe Shoshone Broadcasting, et al.*, 3 F.C.C. Rcd 3948, 3955 (Review Bd 1988) (alleged "passive" investor dominated and controlled enterprise by dictating crucial terms of governing documents and no integration credit was awarded).

59. SCI's positions have been considered in reaching this conclusion. SCI argues that its incompleted corporate structure should be ignored because it is a close corporation and that, in any event, the structure was set by the time integration statements were exchanged in May 1988. Later, SCI argues that Bernstein needs veto rights over Sanchez's sale of any assets or over her possible use of her voting power to issue more stock because he is particularly "vulnerable" as a non-voting shareholder. But that is the very nature of a non-voting shareholder. Thus, the Stockholders Agreement is found to be wholly inconsistent with the role of a non-voting stockholder on which SCI asks the Commission to rely. SCI seems to want informalities of a closely held company when it suits Bernstein's purposes but then opts for more formalized contractual rights to assure him protection against the vulnerabilities of a non-voting shareholder. SCI should not be permitted to have it both ways and still receive credit for its integration.

60. Finally SCI relies on two Commission decisions which are distinguishable from the facts in this case. In *Victory Media*, 3 F.C.C. Rcd 2073 (Comm'n 1988), the applicant lacked bylaws and the articles of incorporation were not amended to reflect the two-tier stock structure until after the "B" cut-off. There the Commission held that the "informality" of the legal structure did not constitute a basis for holding the proposal to be a "sham." *Id.* at 2074. But there is more here than an informal legal structure. Bernstein, through Romano, designed the legal structure to protect himself. Also, in *Victory*, the Commission found that financial and legal assistance provided by non-voting shareholders do not establish that the voting shareholder will not manage in the future. *Id.* at 2074. But in this case Bernstein has continued access to and oversight of check disbursements and a veto on future budgets that will be integral to broadcast policy decisions. Similar facts did not appear in *Victory*. *Id.* (in absence of evidence tht a non-voting stockholder will influence or control corporation absence of bylaws will not prove a "sham.") Contrary to SCI's arguments, the holding here is consistent with *Victory's* holding that:

> applications will be found to be shams only where there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business.

Id. at 2075. The findings and conclusions detailed above constitute the basis for at least inferring Bernstein's influence or control.

61. SCI also relies on the more recent Commission decision in the case of *Susan S. Mulkey, et al.*, 4 F.C.C. Rcd 5520 (Comm'n 1989). While SCI provides no analysis of the decision as authority in this case, *Mulkey* holds that the Commission will not hesitate to discredit an integration proposal where convincing evidence reflects that the non-voting stockholders will exercise an active, rather than a passive role, in the ongoing business. *Id.* at 5521. The evidence in this case shows Bernstein present at every meeting and he has kept himself on as an authorized signer of checks needed to conduct business. In addition, he structured the company in his own interest through his own lawyer. He retains veto rights over the budget and he controls the putative manager's salary. Such indicia of control provide convincing evidence that SCI's proposal should be discredited under the Mulkey holding. Also, in *Mulkey*, the proposed manager had retained local counsel, set up the bank account, and she was the "only person authorized to sign checks," factors deemed significant by the Commission. *Id.* at 5521. Those critical facts run in the other direction in this case. Therefore, under the facts and the law, SCI's integration proposal will not be credited.

Widsten and O-V

62. Widsten and O-V do not claim any credit for integration and therefore none will be awarded to those applicants.

Comparative Analysis and Conclusions

63. Pueblo is credited with 100% integration credit for the full-time participation in management by Henderson. Because of Henderson's media ownership for which there was no timely divestment pledge, Pueblo receives a slight to moderate diversification demerit. But a substantial integration preference outweighs a slight to moderate diversification preference and, therefore, Pueblo is the clear winner. *Richard P. Bott, II, supra at* 4930. *See also Cleveland TV Corp.*, 91 F.C.C. 2d 1129, 1143 (Review Bd 1982), review denied, FCC 83-235 (1983), *aff'd* 732 F.2d 962 (D.C. Cir. 1984). SCI receives no integration credit because of the control which Bernstein retains over the application and SCI's proposed manager. SCI receives no diversification demerit. Widsten and O-V receive no integration credit because neither applicant proposed any integration into management. O-V also receives a slight diversification demerit because of Mendez's employment as general manager of a TV station which he has not committed to leave. SCI and Widsten are the second and third finalists, respectively: Neither is credited with integration and neither has a diversification demerit. Both have proposed auxiliary power. O-V finishes last because of Mendez's broadcast employment.

64. SCI finishes second because of Ms. Sanchez's broadcast experience and minority preference.[9] She is a 25% equity owner who will work at the station and the Commission's policy favors racial minority ownership and participation in broadcast management. *See* Statement Of Policy On Minority Ownership, 68 F.C.C. 2d 979 (Comm'n 1978). As station manager with a 25% ownership interest, Sanchez would have a significant voice in setting the station's programming. Her views would have added credibility by her local residence and her demonstrated involvement in community affairs. *See* Paras. 36-37, supra. The Commission has stated its policy "that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming." 68 F.C.C. 2d at 981. That policy was in abeyance as of December 17, 1986, in order to permit a Rule Making proceeding on the question. But in 1988, the Commission reinstated the policy and presiding judges were specifically directed by the Commission to process comparative cases consistent with that policy. *See* Order, FCC 88-17, released January 14, 1988. However, because O-V does not propose Mr.

Mendez for integration into management, and since he will not leave his present broadcast employment, O-V will not receive a minority preference.

ORDER

Accordingly, based on the foregoing, IT IS ORDERED that unless an appeal from this Decision is taken by a party, or unless the Commission reviews this Decision on its own motion,[10] the applications of Sanchez Communications, Inc. (File No. BPH-861002TB), Hal S. Widsten (File No. BPH-861002TB), and O-V Communications (File No. BPH-861002TH) ARE DENIED.

IT IS FURTHER ORDERED that the application of Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service (File No. BPH-861002TA) for a construction permit for a new FM station on Channel 248A at Oro Valley, Arizona IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Homero S. Pacheco dismissed voluntarily. *Order,* FCC 88M-1344, released May 4, 1988. William N. Freeman was dismissed for failure to pay the hearing fee. *Order,* FCC 88M-1846, released June 16, 1989. Classic Media was dismissed for failing to show good cause for designating a new site. Memorandum Opinion and Order, FCC 89M-1999, released July 28, 1989, *aff'd,* 4 F.C.C. Rcd _____, Review Bd Slip Op. 89R-60, released October 10, 1989. Buena Suerte Broadcasting Corp. was dismissed voluntarily. *Order,* FCC 89M-2048, released August 9, 1989.

[2] There also was a contingent environmental issue added against former applicant Classic Media which became moot when Classic Media's application was dismissed.

[3] Henderson also is an applicant for construction licenses for FM stations at Liberty, Texas and Mason, Texas, and for TV Translators at Alamogordo, New Mexico and Deming, New Mexico. He testified that he would also divest himself from these applications if awarded a grant here. (Pueblo Exh. 2; Henderson, Tr. 93).

[4] The remaining evidence relied on was testimony of Mr. Bernstein and he showed no advance knowledge of what Ms. Sanchez may have developed independently before she went to the meeting.

[5] The rejected evidence consisted of an affidavit of Mr. Romano executed on November 29, 1988, for use in trial and in support of receiving in evidence handwritten notes that are proferred as contemporaneous notes. The evidence was rejected because Romano was not made available for cross-examination. (Tr. 154-56, 159-60.)

[6] Pueblo's IDS states: "Should Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service be awarded the construction permit, through comparative hearing, he will divest of all of his broadcast licenses and applications."

[7] Because there is a clear diversification preference for the two applicants having no chargeable media interests over the one applicant owning three broadcast interests in New Mexico and Texas, there will be no additional analysis needed of the distances of these stations from Oro Valley. *Compare Richard P. Botts, III, supra* at Paras. 20-21.

[8] Because of Henderson's ownership interests, it is of a higher magnitude than the diversification demerit found against O-V. *See Policy Statement, supra* at 394 (the less the degree of ownership in other stations the less will be the significance of the factor). The Commission also stated that it considers media interests to be more significant in the degree that they go towards complete ownership and control. *Id.* at 395. Therefore, Henderson's ownership interests in TV station KASK at Los Cruces, New Mexico and Station KGLF at Freeport, Texas are more significant than Mendez's position as general manager of a TV station in Galveston, Texas. *Id.*

[9] There is no analysis needed under the Commission approved Hirschman-Herfindahl Index ("HHI") because here there is only one party with proposed integration that qualifies for consideration. *Compare Omaha TV 15, Inc. et al.,* 4 F.C.C. Rcd 730, 65 Radio Reg. 2d (P&F) 1019, 1025 (Comm'n 1988) (wherein part time integration credit when analyzed on hourly basis via nonlinear analysis under Justice Department's HHI formula was adapted to FCC broadcast cases).

[10] This Decision shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Orange and Rockland Utilities, Inc.
Ramapo, New Jersey

File No. 750631

For a waiver of the Rules to allow operation of a one-way Multiple Address System on a frequency reserved for full-duplex paired use

WAIVER

Adopted: October 24, 1989; Released: October 30, 1989

By the Chief, Land Mobile and Microwave Division:

1. Orange and Rockland Utilities, Inc. (ORU) seeks a waiver of Sections 94.15 and 94.65 of the Commission's Rules, 47 C.F.R. §§ 94.15 and 94.65, to permit the operation of a one-way remote-to-master Multiple Address System (MAS) on a 928-929 MHz frequency reserved for full-duplex (two-way, two-frequency) paired use, in the Private Operational-Fixed Microwave Service (OFS). Section 94.15(e) requires that full-duplex transmission be conducted on frequency pairs designated for full-duplex use, and that one-way transmission be conducted on non-paired frequencies designated for one-way use. Section 94.65(a)(1) designates certain frequency pairs for full-duplex use and certain single non-paired frequencies for one-way use in MAS systems.

2. ORU has filed the captioned application in the OFS seeking authority to operate a one-way remote-to-master MAS system using the NITECH Power Donut ™ Line Monitoring System technology. The system will be used to monitor vital electrical and environmental parameters on the transmission and distribution facilities of ORU. Remote stations will operate within a 4.3-mile radius of the receive-only master station; they will be mounted on power transmission and distribution lines, and powered from those lines. ORU states that the ability of each remote to be powered directly off the line, without a power supply, external antenna structure, or environmental housing, will provide flexibility that has not until now been available in power line monitoring. The quality and quantity of data resulting will permit substantial increases and greater safety in energy transfers. ORU states that this will promote the more reliable, efficient, and cost effective control and operation of ORU's transmission and distribution network.

3. In support of its request, ORU certifies, based upon frequency engineering analysis, that no suitable non-paired frequencies designated for one-way use in Sections 94.65(a)(1)(i) (General Access Pool) and 94.65(a)(1)(iii) (spectrum shared with Common Carrier eligibles) are available for assignment to its system. It further certifies that its proposed system will not cause harmful interference to any existing or other applied-for systems, as its proposed system is not co-channel with any such systems whose service areas are within 70 miles of ORU's service area.

4. The purpose of Sections 94.15(e) and 94.65(a)(1) is to preserve the integrity of spectrum reserved for paired and non-paired use. In this case, however, ORU has demonstrated by a frequency engineering analysis that none of the non-paired frequencies that would otherwise accommodate its requirements are available for assignment. The Commission has stated in paragraph 56 of its *Report and Order*, PR Docket No. 87-5, 3 FCC Rcd 1564, 1570 (1988), that it will consider waiver of the Rules to allow one-way MAS operations on paired MAS frequencies under such circumstances, provided that the applicant demonstrates the non-availability of one-way spectrum and the satisfaction of co-channel separation criteria. ORU has made the necessary showing.

5. ORU has established unique need and lack of alternatives under our Rules. Further, grant of its request will not undermine the purpose of Sections 94.15 and 94.65 of our Rules, which is to preserve the integrity of spectrum reserved for paired and non-paired use. Under these circumstances, waiver would serve the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

6. Accordingly, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. §0.331, and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, Orange and Rockland Utilities, Inc.'s request for waiver of Sections 94.15 and 94.65 for the referenced application IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 25, 1989

Released: October 30, 1989

Radnor Broadcasting Company, Inc.
Fidelity Court, Suite 200
259 Radnor-Chester Road
Radnor, PA 19087

8940-MLB

Re: Channel 19
Nacogdoches, TX
BPCT-890209KF

Gentlemen:

This is with respect to your above-captioned application for a new commercial television station to operate on Channel 19, Nacogdoches, Texas.

On July 16, 1986, the Commission imposed a "freeze" on applications for new television stations within the minimum co-channel separation distances from 30 designated television markets. *Advanced Television Systems*, Mimeo No. 4074 (released July 17, 1987) (hereafter referred to as the "Freeze Order"). The "freeze" was imposed because the high densities of existing television stations in those markets limited the spectrum available for advanced television ("ATV") service there, and the Commission wanted to preserve its spectrum allocation options for such ATV use. Dallas and Houston, Texas, are two of the listed cities, and all new UHF proposals for communities within 174.5 miles (280.8 km) of Dallas or 204.5 miles (329.0 km) of Houston are subject to the "freeze". Since Nacogdoches is 149.5 miles (240.5 km) from Dallas and 133.8 miles (215.3 km) from Houston, it is therefore within the "freeze" area, and you have requested a waiver.

In support of your waiver request, you maintain that operation of the station in Nacogdoches will have no preclusive effect on the use of Channel 19 in Houston, since the co-channel Station KVCT(TV) in Victoria, Texas, located 109.8 miles (189.5 km) from Houston, already precludes the advanced television use of Channel 19 there. Additionally, you state that the use of Channel 19 in Houston is further precluded by the existence of stations on Channel 20 and 26 there and by a pending Rule Making proposal to add a Channel 16 in Houston. Similarly, you assert that Channel 19 is already precluded for television use in Dallas by land mobile radio use of that channel there as well as by the existence of a station operating on Channel 33 in Dallas. Consequently, you conclude that grant of your waiver request is warranted.

The Commission imposed the "freeze" as a means by which to maximize the options for the allocation of frequencies for ATV use. In its Tentative Decision and Further Notice of Inquiry in *Advanced Television Systems*, 3 FCC Rcd 6520 (1988), the Commission suggested that ATV systems that require the use of additional spectrum should permit the UHF taboos to be disregarded and more stringent co-channel interference protection criteria to be satisfied. Operation at co-channel separations as low as 100 miles may be necessary in order for every existing TV station to be accommodated with supplemental spectrum.

If ATV use of a channel in one of the designated cities in the list of 30 freeze markets is shown to be already significantly restricted by the proximity of another existing station and if the community of license of the proposed station is no closer to the listed city than is the existing station, we believe that sufficient basis exists to grant a waiver of the Freeze Order. Since the Victoria station would have a substantial impact on the availability of Channel 19 for ATV operation in Houston and since Nacogdoches is further away from Houston than is Victoria, we believe that grant of your waiver with respect to Houston is warranted. It should be noted, however, that the existence of other channels in or near a listed city that would preclude the construction of a new station there because of UHF "taboos" would not be a bar to the use of the channel for advanced television. Consequently, the existence of Channels 20 and 26 in Houston and the proposal to add a Channel 16 there would have no impact on the use of Channel 19 in Houston for ATV purposes.

With respect to the proximity of Nacogdoches to Dallas, we note that there is no Channel 19 allocated to the city. Further, the existence of a station operating on Channel 33 there would be no impediment to the use of Channel 19 for ATV since, as we stated above, the UHF "taboos" are not to be considered in making such a determination. Nacogdoches, however, is located close enough to the edge of the 174.5-mile freeze radius around Dallas so that we do not believe that operation of Channel 19 in Nacogdoches will preclude use of that channel for the ATV service in the Dallas area. Consequently, we believe that there is sufficient basis for grant of the waiver.

Accordingly, for the reasons stated above, your request for waiver IS GRANTED, and your application will be accepted for filing in due course.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-465

In the Matter of

Amendment of Section 73.202(b), RM-6905
Table of Allotments,
FM Broadcast Stations.
(Norwich, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Craig L. Fox (petitioner) requesting the allotment of Channel 237A to Norwich, New York, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 237A can be allotted to Norwich in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) south to avoid a short-spacing to unoccupied but applied for Channel 236B at Frankfort, New York.[1] Canadian concurrence in the allotment is required since Norwich is located within 320 kilometers of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 237A to Norwich, New York, since an interest has been expressed in providing the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Norwich, New York	230B	230B, 237A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 22, 1989,** and reply comments on or before **January 9, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Craig L. Fox
1213 Madison Street
Syracuse, New York 13210-2027
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-28-39 and West Longitude 75-33-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-466

In the Matter of

Amendment of Section 73.202(b), RM-6906
Table of Allotments,
FM Broadcast Stations.
(Oil City, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Stephen M. Olszowka (petitioner) requesting the allotment of Channel 242A to Oil City, Pennsylvania, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 242A can be allotted to Oil City in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Oil City is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 242A to Oil City, Pennsylvania, since it could provide the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Oil City, Pennsylvania	253B1	242A, 253B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 22, 1989,** and reply comments on or before **January 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephen M. Olszowka
WKQW Radio
234 Elm Street
P.O. Box 1222
Oil City, Pennsylvania 16301
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b),* 73.504 *and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-25-30 and West Longitude 79-42-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-12

In the Matter of

Amendment of Section 73.202(b), RM-6545
Table of Allotments,
FM Broadcast Stations.
(Oakes, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. At the request of CERM Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1418 (1989), proposing the substitution of Channel 223C1 for Channel 222C2 at Oakes, North Dakota, and the modification of its license for Station KDDR-FM to specify the higher powered channel. The petitioner filed supporting comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 223C1 for Channel 222C2 at Oakes, North Dakota, since it could enable Station KDDR-FM to expand its coverage area. Channel 223C1 can be allotted to Oakes in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 15, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Oakes, North Dakota	223C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of CERM Broadcasting Corporation for Station KDDR-FM, Oakes, North Dakota, IS MODIFIED to specify operation on Channel 223C1, in lieu of Channel 222C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 46-08-12 and West Longitude 98-05-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-17

In the Matter of

Amendment of Section 73.202(b),	RM-6543
Table of Allotments,	RM-6732
FM Broadcast Stations.	RM-6733
(Warren Grove, Tuckerton and Manahawkin, New Jersey)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. At the request of General Electronics Development Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1555 (1989), proposing the allotment of Channel 289A to Warren Grove. The petitioner filed a counterproposal in which it requested the allotment of Channel 289A to Tuckerton, New Jersey, and withdrew its interest in a Warren Grove allotment. In addition, Jersey Shore Broadcasting Corporation ("Jersey Shore") filed a counterproposal requesting the substitution of Channel 289B1 for Channel 261A at Manahawkin, New Jersey, the modification of its license for Station WJRZ(FM) accordingly, and the allotment of Channel 259A to Warren Grove as a substitute for Channel 289A.[2,3] SD Radio Partners filed comments expressing an intention to apply for Channel 289A at Tuckerton and Jersey Shore, Donna Fortenbaugh, Manahawkin Broadcasting Associates, Donald Nelson and the petitioner filed comments expressing an intention to apply for Channel 289B1 at Manahawkin.

2. Petitioner states that Tuckerton is located in Ocean County, and has a 1980 U.S. Census population of 2,472 persons. It goes on to state that there are numerous possible sites in and around Tuckerton where an antenna could be erected, including an existing communications tower. Therefore, it requests the allotment of Channel 289A to Tuckerton as the community's first local FM service. Jersey Shore states that Manahawkin is the commercial and social center of Stafford Township. It submits that Ocean County, in which Manahawkin is located, is in the Monmouth-Ocean, NJ Primary Metropolitan Statistical Area, and that Ocean County is the second largest county in the State. Jersey Shore contends that there is no station licensed within the county which can be received county-wide. Therefore, residents of the area must rely on two Class A FM stations for emergency information relating to area evacuations due to coastal storms or a nuclear emergency at the Oyster Creek Nuclear Generation station. Although Jersey Shore points out that it maintains special remote pick-up radio equipment and portable two-way radios to provide emergency communications, it maintains that the Ocean County Director of Emergency Management has pointed out that its signal "fades" in many areas of the county and has asked the station to attempt to improve its signal. Therefore, it believes that its request to upgrade Station WJRZ(FM) to Channel 289B1 would serve the public interest since it could enable the station to provide emergency information to all of Ocean County.

3. Based on the record before us, we believe that the public interest would be served by allotting a first local channel to Tuckerton and a first local wide coverage area channel to Manahawkin. In addition, we believe that a comparison of the relative needs of the two communities is unnecessary since an alternate Class A channel is available for Tuckerton. Even though the petitioner has withdrawn his interest in use of the channel, such an interest has been expressed by SD Radio Partners. In addition, while we are allotting Channel 289B1 to Manahawkin, we will not modify Jersey Shore's license for Station WJRZ(FM) to specify the higher powered channel. Section 1.420 of the Commission's Rules stipulates that a station's license may be modified in rule making to specify a non-adjacent higher class channel, where, as here, competing expressions of interest have been received, only if an additional equivalent class channel is available. In this case, we have determined that no such additional equivalent class channel is available.

4. Channel 259A can be allotted to Tuckerton in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.9 kilometers (6.2 miles) southeast to avoid a short-spacing to Station WJRZ(FM), Channel 261A at Manahawkin. Channel 289B1 can be allotted to Manahawkin in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.7 kilometers (7.3 miles) east to avoid a short-spacing to Station WBNJ, Channel 288A, Cape May, New Jersey, Station WQSR, Channel 289B, Catonsville, Maryland, and Station WNWK, Channel 290B1, Newark, New Jersey.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 15, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Manahawkin, New Jersey	261A, 289B1
Tuckerton, New Jersey	259A

6. The window period for filing applications for Channel 289B1 at Manahawkin and Channel 259A at Tuckerton will open on **December 18, 1989,** and close on **January 17, 1990.**

7. IT IS FURTHER ORDERED, That the request of General Electronics Development Corporation to allot Channel 289A to Warren Grove, New Jersey, IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Tuckerton and Manahawkin have been added to the caption.

[2] Public Notice of the filing of the counterproposals was given on April 20, 1989, Report No. 1776.

[3] The comments in opposition to the Warren Grove allotment filed by the Pinelands Commission are moot in light of petitioner's withdrawal of interest in use of the channel there. Therefore, those comments will not be discussed.

[4] The coordinates for Channel 259A at Tuckerton are North Latitude 39-33-24 and West Longitude 74-14-30. The coordinates for Channel 289B1 at Manahawkin are North Latitude 39-43-30 and West Longitude 74-07-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-467

In the Matter of

Amendment of Section 73.202(b), RM-7029
Table of Allotments,
FM Broadcast Stations.
(Fairfield, Maine)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Fairfield Broadcast Partners (petitioner), requesting the substitution of FM Channel 228C3 for Channel 227A at Fairfield, Maine. Petitioner also requests modification of its construction permit for Channel 227A to specify Channel 228C3.

2. We believe petitioner's proposal warrants consideration. Channel 228C3 can be allotted to Fairfield, Maine, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[1] Since Fairfield is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government will be obtained. The proposal must conform with the technical requirements of Section 73.1030 (c)(1) - (5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine. We shall also propose to modify the construction permit for Channel 227A, Fairfield, Maine, to specify operation on Channel 228C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the fact that the proposed allotment could provide a wide coverage area station for the Fairfield, Maine area, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Fairfield, Maine	227A	228C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 22, 1989,** and reply comments on or before **January 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036
(Counsel for the petitioner)

6. IT IS Further ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making* to the following:

Passamaquoddy Broadcasting, Inc.
P.O. Box 130
Rockland, Maine 04841

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 228C3 are 44-45-00 and 69-41-15. These coordinates are short spaced to Station WMCM-FM, Channel 228A, Rockville, Maine. However, the *Report and Order* in MM-Docket 86-183 substituted FM Channel 277B1 for Channel 228A at Rockland, and modified the license of Station WMCM-FM to specify operation on Channel 277B1. That action was effective July 25, 1988. The license for Station WMCM-FM was again modified in MM Docket 88-611, to specify operation on Channel 277B, effective August 21, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-468

In the Matter of

Amendment of Section 73.202(b), RM-6889
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. Tenn-Tom Broadcasting Corp. (petitioner) has filed a petition for rule making requesting the substitution of FM Channel 287C3 for Channel 287A at Aberdeen, Mississippi. Petitioner also requests modification of its license for Channel 287A, Aberdeen, to specify operation on Channel 287C3.[1]

2. Channel 287C3 can be allotted to Aberdeen, Mississippi, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at Petitioner's specified site.[2] We shall also propose to modify the license of Station WWZQ-FM, Channel 287A, to specify operation on Channel 287C3 in accordance with Section 1.420(g) of the Rules.

3. In order to provide a wide coverage area station for the Aberdeen, Mississippi area, the Commissions PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Aberdeen, Mississippi	287A	287C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 22, 1989,** and reply comments on or before **Janauary 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jim Buffington, President
Tenn-Tom Broadcasting Corp.
P.O. Box 1240
Aberdeen, Mississippi 39730

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Report and Order in Docket 88-234 substituted FM Channel 287A for Channel 288A at Aberdeen, Mississippi, and modified the license for Station WWZQ-FM to specify operation on Channel 287A. That action was effective January 13, 1989.

[2] The coordinates for Channel 287C3 are 33-50-20 and 88-18-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-469

In the Matter of

Amendment of Section 73.202(b), RM-6815
Table of Allotments,
FM Broadcast Stations.
(Naples Park and Solana, Florida)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 6, 1989; Released: October 31, 1989

By the Chief, Allocations Branch:

1. The Commission herein considers a petition for rule making filed by Wodlinger Broadcasting of Naples, Inc. (petitioner), licensee of Station WIXI(FM), at Naples Park, Florida, proposing to substitute Channel 288C3 for Channel 288A at Naples Park and to modify its Class A license to specify the higher class channel. In order to accomplish the upgrade at Naples Park, petitioner also requests the substitution of Channel 285A for Channel 287A, at Solana, Florida, and the modification of Wayne L. Dilucente's construction permit (BPH-860827MB) for Channel 287A accordingly.

2. Channel 288C3 can be allotted to Naples Park in compliance with the Commission's minimum distance separation requirements with a site restriction 6.1 kilometers (3.8 miles)[1] southeast to avoid a short-spacing to Station WKZM, Channel 288A at Sarasota, Florida, and Station WCAC, Channel 288A at Sebring, Florida. Channel 285A can be substituted for Channel 287A at the current site of the construction permit at Solana, Florida.[2] We are herein issuing a *Show Cause Order* to the permittee of Channel 287A at Solana, Florida, seeking comments as to why the construction permit (BPH-860827MB) should not be modified to specify operation on Channel 285A in lieu of Channel 287A. Whenever an existing permittee or licensee is ordered to switch channels in order to accommodate a new allotment, we require the proponent of the new allotment to make a commitment that it will reimburse the permittee or licensee for reasonable and prudent expenses incurred by the change of channels. Petitioner has indicated its willingness to reimburse the permittee at Solana for its costs in implementing the change in frequency in accordance with Commission policy.

3. In view of the fact that the proposed allotment could provide a wide coverage area station at Naples Park, Florida, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Naples Park, Florida	288A	288C3
Solana, Florida	287A	285A

4. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Wayne L. Dilucente, permittee for Construction Permit (BPH-860827MB) at Solana, Florida, SHALL SHOW CAUSE why its construction permit should not be modified to specify operation on Channel 285A in lieu of Channel 287A.

5. Pursuant to Section 1.87 of the Commission's Rules, Wayne L. Dilucente, may, not later than **December 22, 1989,** file a written statement showing with particularity why his construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Wayne L. Dilucente, to furnish additional information. If Wayne L. Dilucente, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Wayne L. Dilucente, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Wayne L. Dilucente
6775 South A1A
Floridana Beach, FL. 32951

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 22, 1989,** and reply comments on or before **January 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Michael R. Miller
Southmayd, Powell & Taylor
1764 Church Street, N.W.
Washington, D.C. 20036
(Attorney for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's

Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 288C3 at Naples Park are North Latitude 26-13-56 and West Longitude 81-45-10.

[2] The coordinates for Channel 285A at Solana are North Latitude 26-50-41 and West Longitude 82-02-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 31, 1989

TREATMENT OF EX PARTE CONTACTS IN PROCEEDINGS CONCERNING SHARED NETWORK FACILITIES AGREEMENTS THIRD SUPPLEMENTAL SERVICE LIST

Pursuant to Public Notice, DA 89-829 (released July 14, 1989), all of the various formal and informal complaints and tariff investigations involving shared network facilities agreements (SNFAs) were designated as restricted proceedings for purposes of Commission Rules governing ex *parte* contacts. As stated in the Notice, any written presentations in CC Docket No. 85-166, Phase I, tariff investigation, the formal complaints listed in Appendix A of the Notice, or the informal complaints listed in Appendix B of the Notice must be served on all parties of record in CC Docket No. 85-166 and all parties to any formal complaints and informal complaints listed in Appendix C of the Notice. The Notice further provided that service would be required on all parties to any substantively related complaints filed in the future. Consistent with the July 14 Notice, public notices supplementing the original service list were released on August 21, 1989, and September 25, 1989. *See* Public Notice, DA 89-964 (released August 21, 1989); Public Notice, DA 89-1137 (released September 25, 1989).

In accordance with the July 14 Notice, we hereby further amend the service list contained in Appendix C of that Notice to include the following parties:

Keith J. Roland, Esquire
Roland, Fogel, Koblenz & Carr
1 Columbia Place
Albany, New York 12207
(Total Tel USA)

Dale E. Froehlich, Esquire
Midco Communications
410 S. Phillips Avenue
Sioux Falls, South Dakota 57102-092

Peter A. Rohrbach, Esquire
Karis A. Hastings, Esquire
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(Telecom*USA, Inc.)

As stated in the July 14 Notice, this action is taken pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), which permits the Commission, in its discretion, to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

For further information, contact Thomas J. Beers or Kurt A. Schroeder at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COMMONWEALTH TELEPHONE COMPANY — File No. 21458-CD-P/L-1-85

For authority to establish a new one-way signaling facility on frequency 152.84 MHz in the Public Land Mobile Service at Farview, Pennsylvania

MOBILFONE OF NORTHEASTERN PENNSYLVANIA, INC. — File Nos. 21122-CD-P/l-1-85, 22504-CD-P/L-1-85

For authority to establish new one-way signaling facilities on frequency 152.84 MHz in the Public Land Mobile Service at Waverly, New York and Montrose, Pennsylvania

LEO V. CARMODY — File Nos. 22497-CD-P/L-1-85, 22499-CD-P/L-1-85

For authority to establish new one-way signaling facilities on frequency 152.84 MHz in the Public Land Mobile Service at Binghamton and Ithaca, New York

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1989; Released: October 31, 1989

By the Chief, Mobile Services Division:

1. Mobilfone of Northeastern Pennsylvania, Inc. (Mobilfone) filed a petition to dismiss the captioned application filed by Commonwealth Telephone Company (Commonwealth). Commonwealth has filed an opposition and Mobilfone has replied. Also pending are the captioned mutually exclusive applications filed by Mobilfone and Leo V. Carmody.[1] For the reasons stated below, we will grant Mobilfone's petition and dismiss Commonwealth's Farview application because it was amended by a subsequent application.[2]

I. BACKGROUND

2. On December 12, 1984, Mobilfone filed an application for frequency 152.84 MHz for Waverly, New York (File. No. 21122-CD-P/L-1-85) and on March 25, 1985 filed an application for the same frequency to serve Montrose, Pennsylvania (File No. 22504-CD-P/L-1-85). On January 11, 1985, Commonwealth timely filed a mutually exclusive application for frequency 152.84 MHz to serve Farview, Pennsylvania (File No. 21458-CD-P/L-1-85). Leo V. Carmody filed applications on the same frequency to serve Binghamton (File No. 22497-CD-P/L-1-85) and Ithaca, New York (File No. 22499-CD-P/L-1-85) on March 25, 1985.

II. CONTENTIONS OF PARTIES

3. In its petition to deny Commonwealth's application, Mobilfone claims that Commonwealth's 152.84 MHz application for Farview was amended and superseded by its later filing of applications for new one-way stations on frequency 43.66 MHz at fourteen locations in Pennsylvania (File No. 23722- CD-P/L-14-85), including Farview. According to Mobilfone, the Commission in *One - Way Paging Systems*, 89 FCC 2d 1337 (1982), and *One - Way Paging Stations*, 92 FCC 2d 631 (1982), held that if an applicant files for a one-way paging frequency when it has another paging application pending in that market, irrespective of the frequency band, it will treat the previously filed application as being amended by the subsequent application. Under the "one frequency at a time" policy established in these cases the amended application will be considered newly filed and subject to the notice and cut-off rules contained in Sections 22.27 and 22.31 of the rules. Mobilfone argues that in accordance with the Commission's "one frequency at a time" policy, Commonwealth's application for the 43.66 MHz frequency at Farview, filed at a time when its previously filed application for the 152.84 MHz frequency in the same location was pending, amends and supersedes Commonwealth's 152.84 MHz proposal. Therefore, Mobilfone concludes that Commonwealth's application for frequency 152.84 MHz at Farview should be dismissed.

4. In opposition, Commonwealth asserts that it filed applications for the 43.66 MHz frequency stations in response to its customer's demands for a regional paging system that would extend further than the 152.84 MHz wide-area system and that it was the only frequency available that would provide continuous service throughout the region. Commonwealth adds that because the two proposed systems would serve different purposes and have different costs, it is not possible to switch its 152.84 MHz customers to the proposed 43.66 MHz system. Furthermore, Commonwealth maintains that the rule which resulted from *One - Way Paging Systems* and *One - Way Paging Stations*, Section 22.525(e), applies only when at least one of the applications is for a 900 MHz frequency and is therefore inapplicable to the instant situation in which none of its applications requested a 900 MHz frequency. [3]

5. In any event, Commonwealth requests a waiver of Section 22.525(e) should the Commission decide to apply the rule to applicants requesting frequencies other than 900 MHz frequencies. Citing *One - way Paging Systems*, it asserts that Section 22.525(e) was intended to (1) carry out the Commission's 900 MHz policies; (2) encourage new entrants to offer new paging service; and (3) prevent applicants from warehousing frequencies. Commonwealth argues that to apply Section 22.525(e) in this case would not serve the underlying purpose of the rule because it did not apply for a 900 MHz frequency, it is a new entrant in the provision of regional paging service, and

there is no concern that warehousing may occur in view of the clear customer demand for service on the 43.66 MHz frequency. Commonwealth also contends that it would be inequitable to dismiss its Farview application for frequency 152.84 MHz based on Section 22.525(e) because no notice was given that this rule section applied to non-900 MHz applications and because it filed its 152.84 MHz applications in good faith. Commonwealth further argues that the dismissal of its application would disserve the public interest by eliminating the possibility of wide-area paging on the 152.84 MHz frequency in northeastern Pennsylvania, discouraging future applicants from submitting applications for services that the public has demanded, and lessening the competition in the paging market, contrary to the Commission's stated policies. Finally, Commonwealth asserts that should the Commission decide not to waive its rules, Commonwealth should be allowed to modify its 43.66 MHz applications without dismissal of its 152.84 MHz application.

6. Mobilfone, in its reply, reasserts its belief that the "one frequency at a time" policy enunciated in *One - Way Paging Systems* and *One - Way Paging Stations* applies to all frequency bands and is not limited to 900 MHz applications. It points out that this policy is found in Section 22.525(a) of the Commission's Rules, not in Section 22.525(e) as Commonwealth has asserted.[4] Nevertheless, Mobilfone maintains that Section 22.525(e) does not contradict the "one frequency at a time" policy set out in Section 22.525(a). Finally, Mobilfone argues that since Commonwealth has not presented any evidence demonstrating the need to waive the Commission's Rules, Commonwealth should not be allowed to modify its 43.66 MHz applications and its 152.84 MHz application should be dismissed.

III. DISCUSSION

7. We agree with Mobilfone that Commonwealth's Farview 152.84 MHz application should be dismissed. As an initial matter, we note that we have previously addressed and rejected the arguments raised by Commonwealth in this proceeding. In *Commonwealth Telephone Company*, Mimeo 6387 (Mob. Ser. Div., released August 19, 1986) (MSD Order), we dismissed three 152.84 MHz applications filed by Commonwealth because it had subsequently filed 43.66 MHz applications to serve the same areas as the 152.84 MHz applications. In the *MSD Order*, we pointed out that in *One - Way Paging Stations, supra*, the Commission clearly stated that "[I]f an applicant files for a one-way paging frequency when it has another paging application pending in that market, *irrespective of the frequency band*, the Commission will treat the previously filed paging application as being amended by the subsequent application . . . . The amended application will then be considered newly filed and subject to the applicable cut-off procedures." *Id.* at 637 (emphasis in original). Hence, Commonwealth's 43.66 MHz applications were considered major amendments to its 152.84 MHz applications and Commonwealth's 152.84 applications were dismissed.[5] While Commonwealth is correct that Section 22.525(e) applies when at least one of the applications requests a 900 MHz frequency, that rule section does not supersede Section 22.525(a), which enunciates the Commission's "one frequency at a time" policy with respect to all frequencies.

8. Commonwealth filed a 43.66 MHz application for Farview, Pennsylvania when its 152.84 MHz application for the same market was pending, in violation of Section 22.525(a) of the Rules. In accordance with the "one frequency at a time" policy outlined in *One - Way Paging Stations, supra*, we consider Commonwealth's 43.66 MHz application for Farview as a major amendment to the Farview 152.84 MHz application pursuant to Section 22.23(c) of the Rules.[6] Having found that Commonwealth's Farview application for frequency 152.84 MHz is amended and superseded by its application for frequency 43.66 MHz, we will dismiss Commonwealth's Farview 152.84 MHz application. Moreover, Commonwealth has failed to state adequate grounds to justify an exemption from the application of Section 22.525(a) of the Rules. Commonwealth's arguments concerning the waiver of Section 22.525(e) that are based on the rule's underlying purpose are misplaced because Section 22.525(e) applies only when an application for a 900 MHz frequency has been filed, which is not the case here. In addition, with respect to Commonwealth's arguments that are based on public interest and equity considerations, it has presented no evidence to support its claim that there is a customer demand for the service that it proposes to offer on the 43.66 MHz frequency, or that dismissal of its application would eliminate the possibility of wide-area paging service in northeastern Pennsylvania, discourage future applicants from submitting applications for services that the public has demanded, and lessen competition in the paging market.

9. Accordingly, IT IS ORDERED, That the application filed by Commonwealth Telephone Company to serve Farview, Pennsylvania (File No. 21458-CD-P/L-1-85) IS DISMISSED WITHOUT PREJUDICE.

10. IT IS FURTHER ORDERED, That the Request for Comparative Hearing filed by Mobilfone of Northeastern Pennsylvania IS DENIED.

11. IT IS FURTHER ORDERED, That a lottery among the captioned applications of Mobilfone of Northeastern Pennsylvania[7] and Leo V. Carmody SHALL BE HELD at a time and place to be specified in a subsequent public notice.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] In Public Notice, Mimeo No. 5351 (released June 26, 1985), the captioned applications of Commonwealth, Mobilfone, and Leo V. Carmody were announced as apparently mutually exclusive by reason of potential electrical interference. The public notice also listed Mobilfone's application for Monticello, New York (File No. 22505-CD-P/L-1-85) filed on March 25, 1985 as being mutually exclusive with the above-referenced applications. However, by letter dated January 5, 1987, the Mobile Services Division dismissed the Monticello application on the grounds

that it was cut-off from comparative consideration because it was untimely filed with another application with which it was also mutually exclusive. (File No. 22729-CD-P/L-1-85) On February 5, 1987, Mobilfone filed a petition for reconsideration of the dismissal which is pending.

[2] Commonwealth has also requested a comparative hearing on the grounds that such a hearing would allow the Commission to weigh the merits of the wide-area paging service that it proposes to offer as opposed to the service proposed by the other applicants. In light of our dismissal of its application, Commonwealth's request for a comparative hearing is dismissed as moot.

[3] Section 22.525(e) provides in pertinent part that:

> (e) an applicant filing an application for a 900 MHz paging frequency at a location within forty miles of a pending one-way application, without dismissing the previously filed pending application, will be treated as amending the previous application. The amended application will be considered newly filed and subject to the applicable cut-off procedures . . . .

[4] Section 22.525(a) provides in pertinent part that:

> (a) an applicant for a new one-way signaling station may request no more than one channel. . . .

[5] In *Commonwealth Telephone Company*, 4 FCC Rcd 5299 (1989), Commonwealth, in its opposition, requested that the Commission reinstate its previously filed 152.84 MHz applications. In affirming the *MSD Order* dismissing Commonwealth's 152.84 MHz applications, the Commission pointed out that Commonwealth did not file a petition for reconsideration or an application for review of the Order's dismissal of its applications within the deadlines prescribed in Section 405 of the Communications Act and Section 1.106, or in Section 1.115 of the Commission's Rules. Nor did Commonwealth request a waiver of our rules in that proceeding.

[6] Section 22.23(c)(1)(i) indicates that amendments requesting an additional frequency will be classified as major amendments. In *One - Way Paging Stations*, *supra*, 92 FCC 2d at 637-38, the Commission indicated that a second-filed application, treated as an amendment, "will then be considered newly filed and subject to the applicable cut-off procedures. 47 C.F.R. Section 22.23(c)(i); Section 22.31."

[7] Commonwealth has filed a petition to dismiss Mobilfone's application for Montrose, Pennsylvania. However, under Section 1.823(b) of the Commision's Rules, petitions to deny filed against applications for authority in the Public Land Mobile Service will not be reviewed prior to conducting the random selection process.

Before the
Federal Communications Commission
Washington, D.C. 20554

Amendment of Commission's Rules for Codeless Amateur Operator License, Apprentice Class.	RM-6986

ORDER

Adopted: October 24, 1989; Released: October 26, 1989

By the Chief, Private Radio Bureau:

1. The Space Coast Amateur Technical Group (Space Coast) has requested an extension of time in which to file comments in response to the above-captioned rule making petition. RM-6986 was listed on Public Notice Report No. 1794 on September 14, 1989, together with eleven other petitions relating to a codeless class of amateur operator license (RM-6984 through RM-6995). Comments supporting or opposing the petitions were due October 16, 1989. Reply comments are due on or before October 31, 1989.

2. In support of its request, Space Coast states that an extension of time of at least ninety days is needed so that media covering such matters can distribute information to the amateur community. Space Coast also requests that its petition (RM-6986) be combined with the other petitions of a similar nature into one rule making proceeding.

3. An extension of time, such as Space Coast requests, will only serve to delay a decision concerning a codeless class of operator license. Further, if a rule making proceeding concerning a codeless class of operator license is found to be necessary, a decision would be made on whether to join any or all of the twelve petitions in a single proceeding. Moreover, ample time would be afforded in any such proceeding for all interested parties to make their views known with respect to the issues involved.

4. In view of the foregoing, and pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, IT IS ORDERED that the request of Space Coast for a ninety day extension of time to file comments in response to RM-6986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 29, 1989

Released: November 1, 1989
C10-563

Mr. Robert Valentine
Vice President and General Manager
Faircom Charleston, Inc.
1 Orange Grove Road
Charleston, South Carolina 29417

Re: WTMA/WSSX-FM
Charleston, S.C.

Dear Mr. Valentine:

This refers to the pending applications for renewal of the licenses of stations WTMA/WSSX-FM in Charleston, South Carolina (File Nos. BR-880715UA and BRH-880715YA), and for the assignment of license of station WTMA to Jett Communications Inc. (File No. BAL 890208EA).[1] The South Carolina State Conference of Branches of the NAACP, its branches operating in your service area, and the National Black Media Coalition filed a petition to deny on November 1, 1988. By letter dated April 12, 1989, the petitioners moved to withdraw the petition as to WTMA. On July 18, 1989, the petitioners moved to withdraw the petition as to both stations and requested that the Commission renew your licenses. Nonetheless, it is our practice in all cases to review the stations' equal employment opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. Section 309. Review of the applications and subsequent responses reveals that the stations' EEO records reflect repeated violations of the Commission's EEO rule.[2] Accordingly, pursuant to Section 502 of the Communications Act of 1934, this letter also constitutes a Notice of Apparent Liability for forfeiture.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, the Commission may impose a variety of sanctions, or remedies, such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987).

Our review of your renewal applications and the supplemental information for stations WTMA/WSSX-FM does not reveal direct evidence of discrimination but does reveal a significant and consistent failure to comply with the Commission's affirmative action requirements. From August 1, 1985 to October 1, 1988,[3] you had 39 full-time hiring opportunities, 32 of which were upper-level positions.

You appear to have recruited applicants for only 11 of the 39 full-time positions available since you acquired the stations in August of 1985. This recruitment basically consisted of advertisements in three publications: The News Courier, The Evening Post, both general circulation newspapers, and The Chronicle.[4] Occasionally, you placed ads in trade journals as well. The licensee states that it contacted the NAACP generally about vacancies and specifically for two vacancies. However, your general contact with the NAACP was not made until December of 1987, near the end of the license term and no referrals resulted from your two specific contacts. It is unclear how many minority referrals you received for full-time positions from August 1985 to October 1988.

For the remaining 25 of the 39 full-time positions filled from August 1985 to October 1988,[5] the individuals hired were all white and were referred to the stations for the particular positions through a personal contact with either the general manager, the program director, the business manager, or the corporate manager, all of whom were also white.[6] Thus, for these positions, no recruitment was undertaken. Moreover, no minorities were hired for any of the 39 positions.

During the 12-month period immediately preceding the filing of your renewal applications, you had 16 full-time hiring opportunities. You stated in your program report that in this 12-month period, you received seven minority referrals from the Charleston Chronicle, one minority referral from Trident Technical College and three minority referrals from employees at the stations. However, we cannot verify the number of applicants or title of the positions for which you obtained these 11 referrals because you maintained no such records. Nor did you maintain any record of the number of applicants considered for each position or their race, nationality or gender. It would appear that most of the 11 minority referrals in this 12-month period were for the 17 part-time positions. This is evident from the fact that for 12 of the 16 full-time positions, the applicant pool consisted of only one individual referred for the position through a personal contact with either the general manager, the program director or the business manager. You advertised in newspapers for only four of those 16 full-time positions and, while you claim to have received three minority referrals from other employees, none of the full-time positions filled in that 12-month period appear to have included in their applicant pools any applicants referred through other employees.

The available labor force for the Charleston Metropolitan Statistical Area is 30.0% minority (28.1% Black, 1.1% Hispanic, 0.8% other). Your Annual Employment Reports show a marked decrease in the representation of

Blacks on your full-time overall during the license term. In 1985, the stations employed three Blacks out of 31 overall full-time employees (9.7%) and three Blacks out of 26 upper-level full-time employees (11.5%). In 1986, the first year Faircom was required to file an annual report after having acquired the stations in August 1985, you employed only two Blacks out of 31 overall full-time employees (6.5%) and only two Blacks out of 27 upper-level full-time employees (7.4%). In 1987, no Blacks were employed on either the overall full-time staff of 22 or the upper-level full-time staff of 20. Further, in 1988, no Blacks were employed despite a overall full-time staff of 23 and an upper-level full-time staff of 21. No other minorities were hired or employed on your full-time staffs during the license period. Finally, the only two Blacks employed on your 1986 full-time staff were employees that had been hired by the previous licensee and both were terminated during the license term.[7] You argue that your hiring and employment of Blacks on your part-time staff was significant enough to mitigate your failure to employ Blacks on a full-time basis. We disagree. While we might consider part-time employment to be mitigating to some extent in appropriate cases, such consideration is unwarranted here. First, we would not consider such employment as a substitute for the licensee's lack of full-time minority employment in 1987 and 1988 and the weakness of its efforts to recruit more minorities for full-time positions. Second, you stated that part-time employees are not promoted to full-time positions. Third, the number of full-time employees was significantly higher than the number of part-time employees in every year of the license term.[8] Fourth, there appears to have been a high rate of turnover in minority part-time employees during the license term, thus lessening the significance of your hiring of eight Black part-time employees.[9]

Citing *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866, 6869 n. 9 (1988), you also argue that minority employment should not be considered without considering female employment. In this regard, however, the *Kansas City* decision is inapposite. We merely indicated in *Kansas City* that we would examine a licensee's EEO submissions to assure that efforts were made with respect to minorities and women, not that, as you assert, the employment of women would mitigate the licensee's failure to employ minorities. Based on the foregoing, we conclude that from August of 1985 (the date of your acquisition) to October 1, 1988, stations WTMA and WSSX-FM did not have an effective EEO program or engage in on-going self-assessment of its EEO efforts. Thus, there were repeated and continuing failures to comply with the Commission's affirmative action provisions set forth in Section 73.2080(c)(2) and (5) the rules.

In view of our finding that you did not comply with our EEO rules, and our review of pertinent case precedent in this area, we conclude that the renewal applications for stations WTMA/WSSX-FM should be granted only for a short term, subject to reporting conditions for three years and a Notice of Apparent Liability for Forfeiture of $20,000. However, unlike the record in *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), *(Beaumont)*, the instant record does not warrant designation for an evidentiary hearing. In *Beaumont*, designation was required, *inter alia*, because the information before the Commission raised substantial questions as to whether the nearly simultaneous departure of five full-time and six part-time Black employees from the station was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by a petitioner. *Id.* at 504-506. By contrast, your explanation for the departure of your two full-time Black employees is unchallenged and appears reasonable and there is no evidence of intentional discrimination. Thus, the instant case is less egregious than *Beaumont*.

However, WTMA/WSSX's overall affirmative action performance under the current licensee is more egregious than the licensee in *Woolfson Broadcasting Corporation of Salisbury/Ocean City, Inc.*, 4 FCC Rcd 6160 (1989) *(WSBY/WQHQ)*, in which we granted a short term renewal, subject to reporting conditions for three years and a $15,000 forfeiture. The records of both licensees are very similar in their failure to recruit minorities, the underrepresentation of minorities on their staffs, the failure to hire minorities and even the departure of their only two Black full-time employees. However, what is more consistently apparent from WTMA/WSSX's record than that of WSBY/WQHQ, is its inclination to fill new positions through the personal referrals of white employees. In these circumstances, we believe that this case warrants stronger sanctions than the ones imposed in *WSBY/WQHQ*.

In summary, hearing designation, as in *Beaumont, supra*, is not warranted in this case. However, reporting conditions and a greater forfeiture than that imposed in *WSBY/WQHQ, supra*, are warranted.

Accordingly, IT IS ORDERED, That the applications for renewal of license of Stations WMTA/WSSX-FM ARE GRANTED FOR A SHORT TERM ending June 1, 1992, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, Faircom Charleston, Inc. is hereby advised of its apparent liability for forfeiture of $20,000 for its repeated failures to comply with Section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That Jett Communications, Inc., assignee of the license of station WTMA, is subject to the short term renewal ending June 1, 1992 and to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That the licensees of stations WTMA and WSSX-FM, Jett Communications, Inc. and Faircom Charleston, Inc., respectively, are directed to submit an original and one copy of the following information on June 1, 1990, June 1, 1991 and June 1, 1992:

(a) For the June 1, 1990 report, a list of all job vacancies during the twelve months preceding May 1, 1990, and for the June 1, 1991 and June 1, 1992 reports, a list covering the 12 months preceding May 1, 1991 and May 1, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired.

(b) a list of employees as of the May 1, 1990 payroll period for the first report and as of the May 1, 1991 and May 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or

full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, you may submit any information you believe relevant with regard to the station's EEO performance and your efforts thereunder. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202) 632-7069. In regard to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

IMPORTANT - READ INSTRUCTIONS AND RETURN ATTACHED FORM

I. A. The document you have received is a Notice of Apparent Liability. Thus, you may take any of the following actions under Section 1.80 of the Commission's Rules:

(a) You may pay the full amount of the forfeiture within 30 days of the date of the Notice. In this case you should complete the appropriate sections of the attached form and send it along with a check or similar instrument for the amount specified, made payable to the Federal Communications Commission, in the enclosed envelope. To assure that your payment is properly recorded, please enter on your check the control number appearing in the upper righthand corner of the attached form.

(b) Within 30 days of the date of the Notice, you may file a statement, in duplicate, as to why the proposed forfeiture is not warranted or why the amount of the proposed forfeiture should be reduced. The statement must be signed by the licensee; a partner, if the licensee is a partnership; by an officer, if the licensee is a corporation; or by a duly elected or appointed official, if an unincorporated association, and the statement must be supported by pertinent documents and affidavits. The statement may include any justification or any information that you desire to have considered. If you elect to follow this course, you should complete the appropriate section of the attached form and send it along with your statement in the enclosed envelope. Upon such consideration, it will be determined whether any forfeiture should be imposed, and if so whether any forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

(c) You may take no action. In this case a Forfeiture Order will be issued after expiration of the thirty-day period ordering that you pay the forfeiture in full. If you decide to take no action you need not return the attached form.

B. If, in response to this forfeiture notice, you claim a financial inability to pay the full amount of the forfeiture, you should furnish data to support your claim. The data submitted should include, but need not be limited to a profit and loss statement that has been prepared under generally accepted accounting principles. The statement that you furnish should contain no data older than one year from the date of your response.

Items in the statement should include income from broadcast or cable operations, expenses from broadcast or cable operations (including noncash expenses such as amortization and depreciation) and payments to principals (including salaries, commissions, management fees, interest, rents, etc.) If you are an individual or company with multiple station holdings, you should furnish separate profit and loss statements for each entity you own or control, or a consolidated profit and loss statement. You are advised that all financial data furnished with your response will be routinely available for public inspection absent a request for nondisclosure setting forth the reasons therefor pursuant to Section 0.457(d)(2)(i) of the Commission's Rules.

If you have any questions concerning this forfeiture proceeding please communicate them in writing to:

Federal Communications Commission
Enforcement Division
Mass Media Bureau
Washington, DC 20554

or contact Commission staff personnel by telephone at area code 202/632-7551 or 632-6968.

NAL Control No. _____

Federal Communications Commission
Washington, DC 20554

Federal Communications Commission
Fiscal Accounting Section
P. O. Box 19209
Washington, DC 20036

In response to a Notice of Apparent Liability for a monetary forfeiture under the provisions of Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules (CHECK APPROPRIATE BOX):

☐ I am enclosing a check or similar instrument, drawn to the order of the Federal Communications Commission, in the full payment of the forfeiture amount as indicated in the Notice of Apparent Liability. To assure that your payment is properly recorded, please enter on your check the control number appearing in the upper righthand corner of this page.

☐ I am submitting herewith a detailed statement of facts and reasons why I believe the forfeiture as indicated in the Notice of Apparent Liability is not warranted or should be reduced or rescinded.

_____
Name of Licensee Call Letters, City, State

OR

_____
Name of Cable Television System Cable ID, Communities Served

_____
Signature of authorized official Date

_____
Amount of forfeiture as indicated by Notice of Apparent Liability.

NOTICE TO INDIVIDUAL REQUIRED BY THE PRIVACY ACT

Section 308(b) and 503(b) of the Communications Act of 1934, as amended, authorize the Commission to request this information, the purpose of which is to determine your liability for a forfeiture.

The staff will use all relevant and material information before it, including the information disclosed in your statement to determine whether the forfeiture should be cancelled, reduced or paid in full. Notices of Apparent Liability are a matter of public record.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 532a (e)(3).

FOOTNOTES

[1] This assignment was granted on May 25, 1989, but its consummation is contingent upon our final approval of the renewal applications of WTMA/WSSX-FM.

[2] Because your stations are co-situated and filed their annual reports as one unit, we have examined their EEO performance as if they were one unit.

[3] Faircom Charleston Inc. acquired the stations on August 1, 1985 from Sconnix Broadcasting of South Carolina, Inc.

[4] The licensee notes that The Chronicle is specifically targeted to the market's black community.

[5] Two of the 39 persons hired had a resume on file with you and, with respect to the remaining position, you have indicated that you do not know the circumstances under which that person was hired.

[6] Further, it would appear that the only persons considered for the subject 25 positions were white.

[7] You assert that one of these employees, a professional, resigned to pursue employment in a non-related field and the other employee, also a professional, was involuntarily terminated on March 3, 1986 for failure to achieve performance goals established for her position. This latter employee had been with the stations since November 6, 1984.

[8] In 1986, there were 31 full-time employees and only eight part-time employees at the stations. In 1987, there were 11 part-time employees and twice as many full-time employees. Finally, in 1988, there were 23 full-time employees and 16 part-time employees.

[9] The Black part-time employees listed on your 1986 report were not listed on the 1987 or 1988 reports. The only Black part-time employee listed on your 1987 report was not listed on your 1988 report.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-36

In the Matter of

Amendment of Section 73.202(b),	RM-6551
Table of Allotments,	RM-6771
FM Broadcast Stations.	
(Savannah and Cameron,[1] Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1989; Released: November 1, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1765 (1989), proposing the allotment of Channel 224C2 to Savannah, Missouri, as its first local FM service in response to a petition filed by Columbia FM (petitioner). In response to the *Notice*, petitioner filed supporting comments restating its intention to apply for the channel. Radio Cameron, Inc. filed a petition to substitute Channel 225C2 for Channel 222A at Cameron, Missouri, which has been accepted as a counter proposal in this proceeding.[2] KAYS, Inc. filed comments supporting a channel at Savannah. Columbia FM and Radio Cameron, Inc. filed reply comments.

2. Radio Cameron, Inc. (Radio Cameron), permittee of Channel 222A at Cameron, Missouri, suggests the substitution of FM Channel 225C2 for Channel 222A at Cameron. According to Radio Cameron, a Class C2 facility at Cameron would result in new service to an area of 6,940 square kilometers and 79,505 persons.

3. Columbia FM in reply comments acknowledges the conflict between the proposals for Savannah and Cameron. Columbia FM argues that the allotment of Channel 224C2 at Savannah could provide that community with its first local FM service, whereas Radio Cameron's proposal would merely provide expanded service to Cameron.

4. Radio Cameron, in an attempt to resolve the conflict between the two communities, filed reply comments and a second counterproposal. Radio Cameron states that a frequency search was undertaken to locate an alternate channel for Savannah or Cameron that would allow both communities to obtain the requested service. According to Radio Cameron, no additional frequency was found for Savannah, but by using a site restriction, it appears Channel 261C2 can be substituted for Channel 222A at Cameron, resolving the present conflict.

5. Based on the record before us, we believe that both communities are deserving of a new or expanded service. However, Channel 224C2 is the only channel which can be allotted to Savannah and Channel 225C2 is the only channel that can be allotted to Cameron in this proceeding. Radio Cameron's alternate proposal for Cameron, filed in its reply comments, is not acceptable for consideration as it must be considered as an untimely filed counterproposal. Radio Cameron introduces a non-adjacent channel upgrade proposal into this proceeding. Such a proposal differs so substantially from its earlier counterproposal for an adjacent channel upgrade that we must consider it a new counterproposal. [3] Among other things, while Radio Cameron's earlier proposal did not require that we entertain competing expressions of interest, its later proposal does. *See* 47 CFR Section 1.420. Therefore, the two communities must be comparatively considered using the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures* 90 FCC 2d 88 (1982). These priorities are as follows:

(1) First fulltime aural service;
(2) Second fulltime aural service;
(3) First local service; and
(4) Other public interest matters
[co-equal weight given to priorities (2) and (3)]

6. Our decision rests on the third allotment priority, first local service. The channels involved will not provide a first or second fulltime aural service at either community. Savannah does not have a local service while Cameron has both an AM and an FM station. Although neither petitioner submitted additional comments relating to a comparative need for a first local service or an expanded service at their requested community, we believe that it is appropriate to allot Channel 224C2 to Savannah, Missouri, to satisfy the need for first local service in that community.

7. Channel 224C2 can be allotted to Savannah, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 6.4 kilometers west of the community.[4] The site restriction will prevent a conflict with the construction permit for Channel 222A, Cameron, Missouri (BPH880421MG).

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Savannah, Missouri	224C2

9. The window period for filing applications for Channel 224C2 at Savannah, Missouri, will open on **December 19, 1989,** and close on **January 18, 1990.**

10. IT IS FURTHER ORDERED, That the counterproposal filed by Radio Cameron, Inc. requesting the substitution of Channel 225C2 for Channel 222A at Cameron, Missouri (RM-6771) IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Cameron has been added to the caption.

[2] Public Notice of the counterproposal was given on June 2, 1989, Report No. 1781 (RM-6771).

[3] The counterproposal submitted by Radio Cameron, Inc., to substitute Channel 261C2 for 222A at Cameron, Missouri, and modify the construction permit for Channel 222A, will be accepted as a new petition. A Notice of Proposal Rule Making will be issued requesting comments on the proposal.

[4] The coordinates for Channel 224C2 are 39-57-35 and 94-54-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-573

In the Matter of

Amendment of Section 73.202(b),	RM-6495
Table of Allotments,	RM-6684
FM Broadcast Stations.	
(Tawas City, Wurtsmith,	
and Hillman,[1] Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1989; Released: November 1, 1989

By the Chief, Allocations Branch:

1. In response to a petition filed by Tawas City Broadcasting, Inc. ("Tawas City Broadcasting"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 7267 (1988), proposing the substitution of FM Channel 235A for Channel 269A at Tawas City, Michigan. Tawas City Broadcasting also requested modification of its license for Station WDBI(FM) to specify Channel 235A. Mark A. Kilmer (Kilmer) filed comments and a counterproposal in response to the Notice.[2] Tawas City Broadcasting filed comments supporting the substitution at Tawas City. Kilmer and Tawas City Broadcasting filed reply comments. Tawas City Broadcasting filed late comments and a request to accept its late comments.

2. According to Tawas City Broadcasting, the substitution of channels at Tawas City was requested in order to eliminate a severe problem of interference to the reception of Station WDBI(FM) both within its principal city coverage contour and in its city of license. According to petitioner, the interference is caused by the operation of co-channel Station CKNX-FM, Wingham, Ontario, Canada, and is especially severe during summer months. Petitioner further stated that it has installed a new technical facility which has improved its signal quality, but not sufficiently to eliminate the interference. As indicated in the *Notice*, Channel 235A can be substituted for Channel 269A at Tawas City, in compliance with the Commission's minimum distance separation requirements, provided Channel 235A (vacant) is deleted at Wurtsmith, Michigan. [3]

3. Mark A. Kilmer ("Kilmer") filed a counterproposal requesting the allotment of FM Channel 235C2 to Hillman, Michigan, as that community's first local FM broadcast service. Kilmer provides information supporting the allotment to Hillman over the substitution of channels at Tawas City. Kilmer states that Hillman is an incorporated community, has a mayor and six member city council form of government, has numerous retail trade establishments and several factories and is the center of business and social activity in the area. Kilmer argues that the need for a first local service in Hillman outweighs the need for the substitution of one Class A channel for another Class A channel at Tawas City. Kilmer does agree with Tawas City Broadcasting that Channel 235A should be deleted at Wurtsmith. Kilmer notes that since no applications were filed during the window for Wurtsmith, it is proper for the Commission to reallot the channel to another community. According to Kilmer, other alternatives are available to Tawas City Broadcasting to remove the interference problem other than changing channels. Kilmer states that Tawas City Broadcasting could solve its interference problems through coordination with the Canadian government or with the use of a directional antenna.

4. Tawas City Broadcasting, in reply comments, continues to support the allotment of Channel 235A to Tawas City to eliminate an interference problem and provide better coverage of its community of license. Tawas City Broadcasting states that although the counterproposal filed by Kilmer is mutually exclusive with its use of Channel 235A in Tawas City, there is no need for a comparative study because other channels are available for Hillman. According to Tawas City Broadcasting, Channel 277A is available to serve Hillman and Channel 268A will be available once 269A is deleted at Tawas City.

5. Kilmer, in reply comments, objects to Tawas City Broadcasting's proposal to allot a Class A channel to Hillman instead of a Class C2 channel. Kilmer states that he is interested only in a Class C2 facility and that no other party has expressed an interest in a Class A channel at Hillman. Kilmer points out that, in the past, the Commission has not considered the allotment of a class of channel where no expression of interest in the use of such a class of channel has been made. *See, Bradford, Vermont*, 3 FCC Rcd 6964 (1987). Kilmer contends that another Class A channel is available at Tawas City which would eliminate Tawas City Broadcasting's occasional interference problem, the sole basis for its proposed channel substitution. Kilmer continues to support the allotment of a Class C2 facility at Hillman.

6. After consideration of the proposal and the comments and counterproposal filed in response to the *Notice*, we have concluded that Channel 235C2 should be allotted to Hillman, Michigan. No acceptable expression of interest has been received for a Class A allotment at Hillman. Furthermore, our priorities favor a first local service to a community (Hillman) over a substitution of channels for an existing station (Tawas City). Channel 235C2 can be allotted to Hillman, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[4] To accommodate the allotment at Hillman it is necessary to delete Channel 235A (vacant) at Wurtsmith, Michigan. No comments were received supporting retention of Channel 235A or any other channel at Wurtsmith. Therefore, we will delete Channel 235A at Wurtsmith, Michigan, due to lack of interest. Concurrence of the Canadian government has been obtained for this allotment.

7. In response to the proposal filed by Tawas City Broadcasting, a staff engineering analysis confirms that another Class A channel is available for allotment at Tawas City. Channel 297A can be allotted to Tawas City at the specified site given for Channel 235A.[5] The substitution of Channel 297A for 269A should allow Tawas

City Broadcasting the relief from interference it was seeking. Canadian concurrence has been obtained for the allotment of Channel 297A at Tawas City, Michigan.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hillman, Michigan	235C2
Tawas City, Michigan	284C2, 297A
Wurtsmith, Michigan	

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WDBI(FM), Tawas City, Michigan, IS MODIFIED TO SPECIFY operation on Channel 297A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BMLH-880217KE except the channel as specified above. Any changes except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BMLH-880217KF, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

10. The window period for filing applications for Channel 235C2 at Hillman, Michigan, will open on **December 18, 1989,** and close on **January 18, 1990.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Hillman has been added to the caption.

[2] Public Notice of the counterproposal was given on March 17, 1989, Report No. 1771 (RM-6684).

[3] Channel 235A was allotted to Wurtsmith, Michigan, in MM Docket 84-231. *See First Report & Order*, 50 FR 3514, January 25, 1985. The window for filing applications was open from May 12, 1988, to June 16, 1988, and currently there are no applications on file at the Commission for the channel.

[4] The coordinates for Channel 235C2 at Hillman are 45-03-48 and 83-53-54.

[5] The coordinates for Channel 297A at Tawas City are 44-16-27 and 83-39-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-20

In the Matter of

Amendment of Section 73.202(b), RM-6574
Table of Allotments,
FM Broadcast Stations.
(Jeffersonville, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1989; Released: November 1, 1989

By the Chief, Allocations Branch:

1. At the request of Edward F. Stanley (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1441 (1989), proposing the allotment of Channel 291A to Jeffersonville, New York, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.[1]

2. We believe the public interest would be served by allotting Channel 291A to Jeffersonville, New York, since an interest has been expressed in providing the community with its first local FM service. Channel 291A can be allotted to Jeffersonville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jeffersonville, New York	291A

4. The window period for filing applications will open on **December 19, 1989,** and close on **January 18, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Peter Moncure filed comments requesting the allotment of Channel 291A to Oneonta, New York, with a substitute channel proposed for Jeffersonville. However, Moncure failed to serve the petitioner with a copy of the pleading, as required by Section 1.420 of the Commission's Rules. Therefore, Moncure's proposal is an *exparte* contact and will not be considered herein.

[2] The coordinates for this allotment are North Latitude 41-46-51 and West Longitude 74-56-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-40

In the Matter of

Amendment of Section 73.202(b), RM-6571
Table of Allotments,
FM Broadcast Stations.
(Vinton, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1989; Released: November 1, 1989

By the Chief, Allocations Branch:

1. At the request of Harold A. Jahnke (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1803 (1989), proposing the allotment of Channel 296A to Vinton, Iowa, as the community's first local FM service. The petitioner submitted comments and reply comments in which he reiterates his intention to apply for the channel, if allotted. No other comments were received. Channel 296A can be allotted to Vinton in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.3 kilometers (5.8 miles) south to avoid a short-spacing to Station KROC-FM, Channel 295C, Rochester, Minnesota.[1]

2. We believe the public interest would be served by allotting Channel 296A to Vinton, Iowa, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Vinton, Iowa	296A

3. The window period for filing applications will open on **December 19, 1989,** and close on **January 18, 1990.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-04-42 and West Longitude 92-01-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-33

In the Matter of

Amendment of Section 73.202(b), RM-6542
Table of Allotments,
FM Broadcast Stations.
(Petersburg, New Jersey)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1989; Released: November 1, 1989

By the Chief, Allocations Branch:

1. At the request of General Electronics Development Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1445 (1989), proposing the allotment of Channel 274A to Petersburg, New Jersey, as its first local FM service. The petitioner filed supporting comments in which it states its intention to apply for the channel, if allotted. No other comments were received.

2. Petersburg is not listed in the 1980 U.S. Census or incorporated. Therefore, petitioner was requested to submit additional information to show that Petersburg is a community for allotment purposes. In support, it reiterates that Petersburg is a historically significant community in existence since 1849, with a population of 1,986 persons according to the 1986 Rand McNally Atlas. Petitioner notes that although Petersburg is rural in character, it is home to the Petersburg Recreation Center, Petersburg Athletic Fields, Petersburg United Wesley Methodist Church, Upper Township Rescue Squad, Upper Cape Branch of the Cape May County Library, and seventeen businesses, including Gedco, Inc. Electronics, Gilbert Ross Electric, Robert Clark Construction and Castagna Auto Body. Further, petitioner states that the citizens of Petersburg formed a community organization, Petersburg Residents Opposing Unwarranted Development, to preserve the rural nature of the community. Finally, it submits that the lack of more concentrated commercial development should not be construed to infer the absence of a "geographically identifiable population grouping" but rather as reflecting the preference and common will of the community.

3. Based on the above information, we believe that Petersburg is a community for allotment purposes and that the public interest would be served by allotting Channel 274A to the community as its first local FM service. Channel 274A can be allotted to Petersburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) southeast to avoid a short-spacing to Station WMGK, Channel 275B, Philadelphia, Pennsylvania.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Petersburg, New Jersey	274A

5. The window period for filing applications will open on **December 19, 1989,** and close on **January 18, 1990.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-11-58 and West Longitude 74-40-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-34

In the Matter of

Amendment of Section 73.202(b), RM-6552
Table of Allotments,
FM Broadcast Stations.
(Belen and Grants, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1989; Released: November 2, 1989

By the Chief, Allocations Branch:

1. At the request of Brooks Broadcasting Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1721 (1989), proposing the substitution of Channel 249C for Channel 249A at Belen, New Mexico, the modification of its license for Station KARS-FM to specify the higher powered channel, and the substitution of Channel 265C2 for unoccupied but applied for Channel 250C2 at Grants, New Mexico. The petitioner filed comments reiterating its intention to apply for Channel 249C, if allotted to Belen. No other comments were received.

2. We believe the public interest would be served by substituting Channel 249C for Channel 249A at Belen, New Mexico, and substituting Channel 265C2 for Channel 250C2 at Grants, New Mexico, since it could enable Station KARS-FM to expand its coverage area. As proposed, we will modify petitioner's license for Station KARS-FM to specify operation on Channel 249C and modify the construction permit of Don R. Davis ("Davis") for a new station at Grants, New Mexico, to specify operation on Channel 265C2 in lieu of its present Channel 250C2.[1] Channel 249C can be allotted to Belen in compliance with the Commission's minimum distance separation requirements and can be used at Station KARS-FM's present transmitter site. Channel 265C2 can be allotted to Grants in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Davis' outstanding construction permit.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 18, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Belen, New Mexico	249C
Grants, New Mexico	265C2, 279C, 288C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Don R. Davis for a new FM station at Grants, New Mexico, IS MODIFIED to specify operation on Channel 265C2 in lieu of Channel 250C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Davis' construction permit, BPH-880616NF, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BPH-880616NF, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Brooks Broadcasting Company, Inc. for Station KARS-FM, Belen, New Mexico, IS MODIFIED to specify operation on Channel 249C, in lieu of Channel 294A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows: Don R. Davis, 3611 Altamonte Avenue NE, Albuquerque, New Mexico 87110.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time the *Notice* was issued, Davis was the sole applicant for Channel 250C2 at Grants. Grant of his construction permit was conditioned on the outcome of this proceeding.

[2] The coordinates for Channel 249C at Belen are North Latitude 34-45-02 and West Longitude 106-39-55. The coordinates for Channel 265C2 at Grants are North Latitude 35-07-09 and West Longitude 107-54-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 81-742

In the Matter of

Formulation of Policies And Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: October 4, 1989; Released: October 5, 1989

By the Chief, Mass Media Bureau:

1. On August 16, 1989, the Commission released a *Third Further Notice of Inquiry and Notice of Proposed Rule Making* (" *Third Further Notice* ") in the above-captioned proceeding, soliciting comment on an additional proposal for determining how an incumbent licensee may obtain a renewal expectancy in a comparative renewal hearing.[1] The Commission proposes to continue to award a renewal expectancy based upon an incumbent licensee's past meritorious service, but adopt a new order of proof to apply this standard. The deadlines for filing comments and reply comments in response to the *Third Further Notice* are currently October 10, 1989, and October 25, 1989, respectively.

2. On September 25, 1989, a motion for extension of time for filing comments and reply comments was filed by the National Association of Broadcasters ("NAB"). The motion requests that the deadline for filing comments be extended by 30 days to November 9, 1989, and that the deadline for filing replies be extended by 37 days to December 1, 1989.

3. NAB contends that the extension of time is necessary because of the complexity and importance of the issues raised in the *Third Further Notice*. It notes that the *Third Further Notice* raises questions such as the workability of the proposal, its consistency with the Communications Act, and its compatibility with other renewal expectancy reforms proposed in this proceeding. NAB believes that such an analysis requires an in-depth consideration of the many facets of this proceeding, taken as a whole, and thus necessitates a greater amount of time to prepare comments than has been provided. NAB alleges that, by granting the requested extension, the Commission will facilitate commenters in making a thorough analysis, thereby resulting in the development of a more complete and accurate record in this proceeding.

4. Although Section 1.46(a) of the Commission's Rules provides that extensions of time should not be routinely granted, we believe that, in this case, NAB has presented valid reasons for granting the requested extensions. In particular, we agree that it is of the utmost importance to develop a complete record on the question of how to award renewal expectancies in comparative renewal hearings. Indeed, even after proferring further proposals in the *Second Further Notice of Inquiry and Notice of Proposed Rule Making* and considering the comments filed in response thereto, we determined that further study was necessary.[2] We also acknowledge that devising a meaningful renewal expectancy standard and method for applying it is a complex and difficult task. Given the importance of this issue, we believe that an additional amount of time to respond to the latest proposal is warranted.

5. Accordingly, IT IS ORDERED THAT the motion for extension of time filed by the National Association of Broadcasters IS GRANTED and that the time for filing comments and reply comments in BC Docket No. 81-742 IS HEREBY EXTENDED to November 9, 1989, and December 1, 1989, respectively.

6. This action is taken pursuant to authority found in Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.45-46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] 4 FCC Rcd 6363 (1989), summarized at 54 Fed. Reg. 35357 (Aug. 25, 1989).

[2] See Third Further Notice, 4 FCC Rcd at 6364-65.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of the Alternative Carrier Telecommunications Association for Notice of Inquiry and Rule Making	RM-7007

ORDER

Adopted: October 16, 1989; Released: October 17, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On August 23, 1989, the Alternative Carrier Telecommunications Association filed a petition requesting that the Commission institute a Notice of Inquiry and Rule Making "to obtain facts and information on the present state of competition in the long distance communications marketplace."[1] In accordance with the Commission's rules, public notice was given that comments on the ACTA Petition could be filed through October 20, 1989.[2] The National Telecommunications Network has filed a motion seeking a three-week extension of the time period for filing comments, until Nov. 10, 1989. [3] No party has filed in opposition to the NTN Motion.

2. NTN argues that the ACTA petition "raises at least fourteen distinct issues to be investigated," and that "[a]ssessment of these issues will require a substantial commitment of time for preparation of adequate responses."[4] NTN also states that the preparation of its comments "will be substantially aided by meetings and discussion at the annual Fall Business Conference of the Competitive Telecommunications Association," which ended October 12, 1989.[5] Finally, NTN contends that, [g]iven the broad scope of ACTA's petition and the vital importance of the interexchange market to the U.S. economy, there is reason to encourage complete public comment" by extending the current October 20th filing deadline.[6]

3. While it is the Commission's policy that extensions of time shall not be routinely granted,[7] in light of the ACTA Petition's broad scope and the absence of apparent prejudice to any interested party, we believe NTN has made a sufficient showing to justify its request for a three-week extension of the comment cycle in this instance.

4. Therefore, IT IS ORDERED, that the NTN Motion is GRANTED. Parties wishing to file comments on the ACTA Petition shall do so no later than **November 10, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition of the Alternative Carrier Telecommunications Association for Notice of Inquiry and Rule Making, filed Aug. 23, 1989 (ACTA Petition).

[2] 47 C.F.R. § 1.403; FCC Public Notice, Petitions For Rule Making Filed, Mimeo No. 4485, released Sept. 20, 1989.

[3] Motion for Extension of Time of the National Telecommunications Network, filed Oct. 12, 1989 (NTN Motion).

[4] NTN Motion at 1-2.

[5] *Id.* at 2.

[6] *Id.*

[7] 47 C.F.R. § 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-474

In the Matter of

Amendment of Section 73.202(b), RM-6930
Table of Allotments,
FM Broadcast Stations.
(Brookings, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 12, 1989; Released: November 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dakota Broadcasting, Inc. (petitioner) requesting the substitution of Channel 229C1 for Channel 229C2 at Brookings, South Dakota, and the modification of its license for Station KGKG to specify the higher powered channel.[1] Petitioner states that it will apply for the channel, if allotted.

2. Channel 229C1 can be allotted to Brookings with a site restriction of 26.8 kilometers (16.6 miles) west to avoid a short-spacing to the site specified in the outstanding construction permit of Station KVDB-FM, Channel 230C2, Sioux Center, Iowa, and to unoccupied but applied for Channel 230A at Granite Falls, Minnesota.[2] As requested, we will also propose to modify petitioner's license for Station KGKG to specify operation on Channel 229C1.

3. We believe the public interest would be served by proposing the substitution of Channel 229C1 for Channel 229C2 at Brookings, South Dakota, since it could enable Station KGKG to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Brookings, South Dakota	229C2	229C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 26, 1989,** and reply comments on or before **January 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ross A. Johnson, Vice President
Dakota Broadcasting, Inc.
51 Broadway
P.O. Box 8310
Fargo, North Dakota 58109-8310
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner has submitted an application (BPH-890321IF) specifying operation on Channel 229C2 in lieu of Channel 232A, pursuant to the *Report and Order* in MM Docket 88-72.

[2] The coordinates for this allotment are North Latitude 44-22-44 and West Longitude 97-06-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-475

In the Matter of

Amendment of Section 73.202(b), RM-6925
Table of Allotments,
FM Broadcast Stations.
(Mount Vernon, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1989; Released: November 3, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Linda Adams, d/b/a Missouri FM (petitioner), requesting the substitution of FM Channel 294C3 for Channel 294A at Mount Vernon, Missouri. Petitioner also requests modification of her construction permit (BPH-861126ME) for Channel 294A, to specify Channel 294C3.

2. We believe petitioner's proposal warrants consideration. Channel 294C3 can be allotted to Mount Vernon, Missouri, in compliance with the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the construction permit of Linda Adams to specify operation on Channel 294C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Mount Vernon, Missouri, area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

	Channel No.	
Community	Present	Proposed
Mount Vernon, Missouri	294A	294C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 26, 1989,** and reply comments on or before **January 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan C. Campbell
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 294C3 are 37-09-16 and 93-36-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-476

In the Matter of

Amendment of Section 73.202(b), RM-6969
Table of Allotments,
FM Broadcast Stations.
(El Dorado, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1989; Released: November 3, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Gary L. Violet (petitioner), requesting the substitution of FM Channel 256C1 for Channel 256C2 at El Dorado, Kansas. Petitioner also requests modification of his construction permit (BMPH-881104IE) for Channel 256C2, to specify Channel 256C1.

2. We believe petitioner's proposal warrants consideration. Channel 256C1 can be allotted to El Dorado, Kansas, in compliance with the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify petitioner's construction permit to specify operation on Channel 256C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the El Dorado, Kansas, area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

	Channel No.	
Community	Present	Proposed
El Dorado, Kansas	256C2	256C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 26, 1989,** and reply comments on or before **January 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leonard S. Joyce
Blair, Joyce & Silva
1825 K Street, N.W.
Washington, D.C. 20006
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 256C1 are 37-57-00 and 96-59-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-477

In the Matter of

Amendment of Section 73.202(b), RM-6962
Table of Allotments,
FM Broadcast Stations.
(Arkansas City, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1989; Released: November 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by John C. McVey (petitioner), requesting the allotment of FM Channel 300A to Arkansas City, Kansas, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 300A can be allotted to Arkansas City, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[1]

3. In view of the fact that the proposed allotment could provide a second FM broadcast service to Arkansas City, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Arkansas City, Kansas	293C	293C, 300A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 26, 1989,** and reply comments on or before **January 10, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John C. McVey
Rural Route 5, Box 206
Arkansas City, Kansas 67005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 300A are 37-03-30 and 97-02-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Correction of Part 73 of the
Commission's Rules

ORDER

Adopted: October 30, 1989; Released: November 2, 1989

By the Chief, Mass Media Bureau:

1. This *Order* amends the Commission's Rules to correct an omission in Title 47 of the Code of Federal Regulations. Specifically, the Commission makes an editorial change to 47 CFR Section 73.658 to reinsert Notes 1, 2, 3, and 4 at the end of Paragraph (m). These notes, which are needed to clarify the procedures set forth in that section, were inadvertently deleted from the Code of Federal Regulations following Commission adoption of the *Report and Order* in Gen. Docket No. 87-24 (53 FR 27167, July 19, 1988). This *Order* makes no substantive changes that impose additional burdens or remove provisions relied upon by licensees or the public. For this reason, we believe that this revision will serve the public interest. This information is restored as part of the Agency's oversight function.

2. This amendment is implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because this amendment only interprets and clarifies the existing language of Section 73.658(m), prior notice of rule making is not required. 47 CFR Section 1.412(c). For this same reason, this amendment may become effective upon publication in the *Federal Register*. 47 CFR Section 1.427(b). Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

3. Therefore, IT IS ORDERED, That pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections O.61 and 0.283 of the Commission's Rules, Part 73 of the FCC Rules and Regulations IS AMENDED as set forth below, effective upon publication in the *Federal Register*.

4. For further information on this *Order*, call Rita S. McDonald, Policy and Rules Division at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. Sections 154 and 303.

2. Section 73.658 is corrected by adding Notes 1, 2, 3, and 4 at the conclusion of Paragraph (m) to read as follows:

Section 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

* * * * *

(m) * * *

Note 1: Contracts, arrangements, or understandings that are complete under the practices of the industry prior to August 7, 1973, will not be disturbed. Extensions or renewals of such agreements are not permitted because they would in effect be new agreements without competitive bidding. However, such agreements that were based on the broadcaster's advancing "seed money" for the production of a specific program or series that specify two time periods -- a tryout period and period thereafter for general exhibition -- may be extended or renewed as contemplated in the basic agreement.

Note 2: It is intended that the top 100 major television markets listed in Section 76.51 of this chapter shall be used for the purposes of this rule and that the listing of the top 100 television markets appearing in the ARB Television Market Analysis shall not be used. The reference in this rule to the listing of markets in the ARB Television Market Analysis refers to hyphenated markets below the top-100 markets contained in the ARB Television Market Analysis. If a community is listed in a hyphenated market in Section 76.51 and is also listed in one of the markets in the ARB listing, the listing in Section 76.51 shall govern.

Note 3: The provisions of this paragraph apply only to U.S. commercial television broadcast stations in the 50 states, and not to stations in Puerto Rico or the Virgin Islands, foreign stations or noncommercial educational television or "public" television stations (either by way of restrictions on their exclusivity or on exclusivity against them).

Note 4: New stations authorized in any community of a hyphenated market listed in Section 76.51 of this chapter or in any community of a hyphenated market listed in the ARB Television Market Analysis (for markets below the top-100 markets) are subject to the same rules as previously existing stations therein. New stations authorized in other communities are considered stations in separate markets unless and until Section 76.51 is amended by Commission action, or the ARB listing is changed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN NEW ENGLAND
TELEPHONE COMPANY

Petition for Review of Accounting Orders
Imposed in Tariff Investigations

Termination of Accounting	Transmittal Nos. 12497,
Orders Regarding General	13490-13492,
Rate Increases	13703-13708, and 13775

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1989; Released: November 3, 1989

By the Commission:

I. INTRODUCTION

1. Southern New England Telephone Company (SNET) filed a petition for review (Petition) on August 14, 1987, requesting that this Commission review certain accounting orders for the purpose of determining whether the accounting orders should be terminated. These orders address four categories of carrier tariff filings made by American Telephone and Telegraph Company (AT&T) and the Bell System Operating Companies (BSOCs) between 1968 and 1982: those involving (1) Exchange Network Facilities for Interstate Access (ENFIA) tariffs; (2) those involving general rate increases between 1976 and 1981; (3) those involving private line rates; and (4) those involving WATS and 800 Service rates. The orders are listed in the Appendix to this Order. On August 26, 1987, this Commission released a Public Notice inviting comments on SNET's petition.[1] In response, MCI Telecommunications Corp. (MCI) filed a motion on October 28, 1987, entitled "Motion To Consider Accounting Orders in the Proceedings in Which They Have Been Entered" (MCI Motion). Other comments were filed on February 16, 1988, and replies were filed on April 4, 1988.[2]

2. The initial Order released in this proceeding detailed the parties' views regarding the general propriety of reviewing the continued utility of the accounting orders cited in the SNET petition.[3] Briefly, SNET asserts that the cited accounting orders remain in an "open status" as a result of investigations that were initiated before the Bell System divestiture. According to SNET, however, the ensuing years have brought major changes in the regulatory environment. SNET states that the divestiture by AT&T of its local exchange operations has had the most profound effect on the issues involved in these investigations. SNET Petition at 3. Therefore, SNET contends that while these accounting orders are technically still in effect, the accounting orders have in fact been nullified by subsequent events. *Id.* SNET states that while it is seeking to terminate a number of these orders, it stands ready to make any refunds this Commission deems necessary to conclude these proceedings. *Id.* at 1-4. Most commenters generally support SNET's request that this Commission review the accounting orders described in the SNET petition.

3. We agree with the parties that the orders should be reviewed and in this, the second Order of this proceeding, we terminate three accounting orders which were imposed by this Commission in the *Rate Increase Orders* entered in connection with our investigation of general rate increases proposed by AT&T for its switched and private line services between 1976 and 1981.[4]

II. RATE INCREASE ORDERS

A. *Background*

4. The initial *Rate Increase Order*,[5] related to AT&T Transmittal 12497, which was supposedly designed to yield a 9.5 percent return. This rate of return was authorized by this Commission in Docket No. 20376, after a full hearing, on February 5, 1976.[6] The revisions contained in Transmittal 12497 increased rates for intra-mainland United States MTS in the lower mileage bands, with proportionally greater increases for calls requiring operator assistance, and decreased rates in the higher mileage bands for dial station-to-station calls.[7] In addition, AT&T changed MTS service between the mainland United States and Alaska and Hawaii. Finally, AT&T increased rates for shorter distance calls and either decreased or held constant rates for longer distance calls.[8] Many of the issues raised by petitioners in this proceeding were being investigated at the time in other proceedings, including the *Private Line* [9] and *Dataphone Digital Service* [10] proceedings. Hence, this Commission decided to delay the investigation of Transmittal 12497 until these proceedings were completed.[11] In the interim, we decided to allow Transmittal 12497 to become effective on the condition that AT&T maintain an accounting of the revenues derived from that transmittal.[12]

5. In the second of the *Rate Increase Orders*,[13] this Commission decided to investigate tariff filings (Transmittal Nos. 13490, 13491, and 13492) made by AT&T and various BSOCs after we prescribed an interim rate of return of 10.5 percent. We decided to initiate this investigation after previously finding that AT&T and the BSOCs had violated a prior prescription.[14] As in the first Order, we required AT&T to maintain an accounting of the revenues produced under the newly filed rates. Finally, in the last of the *Rate Increase Orders*,[15] this Commission suspended Transmittal Nos. 13703-13708 and 13775 filed by AT&T which proposed a 16 percent across-the-board increase in rates for virtually all of its interstate services. We were concerned that the proposed increase would result in a Message Telecommunications Service (MTS) category rate of return in excess of the 12.75 percent rate of return adopted June 8, 1981.[16] Along with suspending AT&T's proposed revisions, we ordered AT&T to maintain an accounting order until completion of the investigation.[17]

B. *Pleadings*

6. Only AT&T commented on SNET's petition with respect to the *Rate Increase Orders*. AT&T asserts that the accounting orders imposed during the investigation of AT&T's general rate increases filed between 1976 and 1981 should be terminated because there is no likelihood that any refunds will result from the investigations ini-

tiated in those Orders. AT&T explains that the rate increases which were the subject of those investigations never resulted in an excessive rate of return, except for 1978, for which refunds have already been made.[18] AT&T Comments at 3-4. AT&T concludes that since it has not overearned in the years covered by the *Rate Increase Orders*, and it has issued refunds for the one year that it did overearn, AT&T does not owe any further refunds. Therefore, AT&T argues, the investigations at issue should be terminated.

C. *Discussion*

7. It is well-settled that this Commission has the discretion to complete pending investigations of rates even though the rates have been superseded by subsequent tariff filings.[19] We may still have issues to decide regarding the investigated rates, including whether to order a refund if the investigated rates are found to be unlawfully high, or whether significant questions of law and policy need to be resolved as to the old rates in order to evaluate the new ones. Conversely, this Commission also has the discretion to terminate any investigation if we determine that there is no longer any reason for continuing such investigation. We have determined that the rates established in AT&T Transmittals 12497, 13490, 13491, 13492, 13703-13708, and 13775 do not warrant further investigation.

8. We conclude that the rates which are the subject of investigation in the *Rate Increase Orders* have been superseded by subsequent filings and that SNET persuasively argues that those same rates are obsolete. All three of these investigations were initiated prior to the Bell System divestiture, which means that the rates at issue have not been in effect for some time. Moreover, AT&T did not overearn for any of the years in question, except 1978. And for that year, AT&T has already issued refunds.[20] Thus, we see no need to issue any further refunds in these investigations. For these reasons we believe it is prudent to terminate the investigations initiated in the *Rate Increase Orders*, and the accounting orders imposed therein. Our action will prevent further unnecessary expenditure of carrier and Commission resources to comply with, and enforce, respectively, the accounting orders in those proceedings.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the investigations of AT&T rates initiated as to Transmittal Nos. 12497, 13490-13492, 13703-13708, and 13775 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Commission Establishes Pleading Cycle for Petitions Concerning Southern New England Telephone Company's Petition for Review of Outstanding Accounting Orders, 2 FCC Rcd 5262 (1987).

[2] The parties filing comments are: Ameritech Operating Companies (Ameritech), American Telephone and Telegraph Company (AT&T), BellSouth Telephone Companies, Cincinnati Bell Telephone, Contel Corporation (Contel), GTE Telephone Companies (GTOC), MCI, Southwestern Bell Telephone Company (SWB), and United States Telephone Association (USTA). Reply comments were filed by: BellSouth, MCI, SWB, USTA, Pacific Bell and Nevada Bell, Bell Atlantic Telephone Companies, and SNET.

[3] *See* Southern New England Telephone Company, Petition for Review of Accounting Orders Imposed in Tariff Investigations, Docket 21499, 4 FCC Rcd 5500 (1989). In that Order we terminated certain investigations of BSOC ENFIA rates and accounting orders imposed therein.

[4] American Telephone and Telegraph Company, Transmittal No. 12497, Docket No. 20732, Memorandum Opinion and Order, 58 FCC 2d 1 (1976); American Telephone and Telegraph Company, Western Union Telegraph Company, and the Bell System Operating Companies, Charges for Interstate Services, Mimeo No. 32427, released June 13, 1980 (Com.Car.Bur.); American Telephone and Telegraph Company, Transmittal Nos. 13703-13708, *et. al.*, 86 FCC 2d 956 (1981) (*Rate Increase Orders*).

[5] American Telephone and Telegraph Company, Transmittal No. 12497, Docket No. 20732, Memorandum Opinion and Order, 58 FCC 2d 1 (1976).

[6] *See* Charges for Interstate Telephone Service, Docket No. 20376, 57 FCC 2d 960 (1976).

[7] 58 FCC 2d at 1.

[8] *Id.* at 1-2.

[9] *See* Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, Report and Order, 97 FCC 2d 923 (1984).

[10] *See* American Telephone and Telegraph Company, Dataphone Digital Service, Memorandum Opinion and Order, Mimeo No. 07192, released Feb. 20, 1981.

[11] 58 FCC 2d at 3-4.

[12] *Id.* at 4-5.

[13] American Telephone and Telegraph Company, Western Union Telegraph Company, and the Bell System Operating Companies, Charges for Interstate Services, Mimeo No. 32427, released June 13, 1980.

[14] *See* Charges for Interstate Telephone Service, Docket No. 20376, Memorandum Opinion and Order, 51 FCC 2d 619 (1975); *recon denied*, 53 FCC 2d 1073 (1975).

[15] American Telephone and Telegraph Company, Transmittal Nos. 13703-13708, *et. al.*, 86 FCC 2d 956 (1981).

[16] *Id.* at 959-60, *citing* American Telephone and Telegraph Company, Mimeo No. 001406, released June 8, 1981.

[17] *Id.* at 979.

[18] *See* AT&T, Earnings on Interstate and Foreign Services During 1978, CC Docket No. 79-187, 102 FCC 2d 52 (1984). AT&T explains that it implemented a refund of its 1978 overearnings through rate revisions which became effective June 1, 1985.

[19] *See, e.g.*, American Telephone and Telegraph Company v. FCC, 487 F.2d 865, 880 (2d Cir. 1973); Arctic Slope Regional Corp. v. FERC, 832 F.2d 158 (D.C. Cir. 1987).

[20] *See* AT&T Earnings on Interstate and Foreign Services During 1978, CC Docket No. 79-187, Decision, 102 FCC 2d 52 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION Revisions to Tariff F.C.C. No. 103 — Transmittal No. 680

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1989; Released: November 3, 1989

By the Commission:

I. INTRODUCTION

1. On April 18, 1988, Pan American Satellite (Panamsat) filed an application for review (Application) of an Order of the Chief of the Common Carrier Bureau (Bureau), denying Panamsat's petition to suspend and investigate Transmittal No. 680 filed by Communications Satellite Corporation (Comsat). Communications Satellite Corporation, 3 FCC Rcd 1884 (1988) (*Order*). Comsat filed an opposition to the application for review (Opposition) and Panamsat replied (Reply).[1] For the reasons given below, we deny the application and affirm the Bureau's decision regarding Transmittal No. 680.

II. BACKGROUND

2. On December 22, 1987, Comsat filed Transmittal No. 680 in which it proposed *interalia* (1) to introduce duplex service[2] at a rate below that for two simplex channels to give all multi-year International Business Satellite (IBS) services a rate reduction to all regions at C-band and K-band;[3] (2) to reintroduce a seven-year contract for IBS to permit rollovers from existing seven-year frequency modulation contracts;[4] and (3) to reduce multi-year 64 Kbps IBS contract rates at C-band, with the rates varying by geographic region. *Order*, 2 FCC Rcd at 1884.

3. In its petition to suspend and investigate, Panamsat argued that the transmittal was similar to Comsat's earlier "Caribnet" filing, Transmittal No. 630, which the Bureau had suspended and set for investigation.[5] Further, Panamsat asserted that although the filing ostensibly applied to all regions, in fact, its greatest impact was on the Caribbean region. In addition, Panamsat maintained that the proposed rates are discriminatory in violation of Section 202 of the Communications Act because Comsat intended to charge different rates for routes for which its costs are identical. Also, Panamsat argued that Comsat had provided no support for its claim that the rate reductions are designed to meet the competition. Finally, Panamsat contended that Comsat failed to provide adequate cost support data as required by Section 61.38 of this Commission's Rules, 47 C.F.R. § 61.38.

4. In response, Comsat asserted that Transmittal No. 680 was substantially different from the Caribnet filing. According to Comsat, the proposed reductions were smaller than those in the Caribnet filing. Furthermore, Comsat alleged that the discounts did not target a particular region but applied world-wide. Comsat also stated that it provided sufficient cost support data in compliance with Section 61.38 of this Commission's Rules, and that the lower rates were necessary due to competition from domestic satellites and fiber optic cable providers. The Bureau denied Panamsat's petition. *Order*, 3 FCC Rcd at 1884.

III. SUMMARY OF PLEADINGS

A. *Application for Review*

5. Panamsat makes three arguments in its application for review. Panamsat first argues that the IBS rates at issue here are "substantially similar" to those proposed in the Caribnet proceeding. Application at 5. For example, Panamsat states that in Caribnet, Comsat proposed charging a uniform $200 monthly rate for all 64 Kbps service for one year or more. In Transmittal 680, according to Panamsat, Comsat likewise proposed rates of approximately $200 a month for such service; the specific charge depends on the term of the lease and on whether the customer orders simplex or duplex service. *Id.* at 6. Furthermore, Panamsat alleges that Comsat has expanded the discounted charges beyond the Caribbean to Latin America and Europe. While Panamsat concedes that Comsat's IBS rates for all other routes have also been discounted, Panamsat claims that those discounts are less substantial.

6. Panamsat asserts that Comsat, as it attempted to do in its Caribnet filing, sought to justify the Transmittal 680 rates on the basis of competitive necessity. Panamsat says the Bureau concluded in Caribnet that it could not make such a determination without additional information and ordered Comsat to furnish information concerning the rates its competitors, either present or potential, were charging. Based on the information received, the Bureau suspended the Caribnet filing, and set the rates for investigation. *Caribnet*, 2 FCC Rcd at 2422. Panamsat asserts that again in Transmittal 680 Comsat failed to supply information concerning its competitors' rates which would serve to meet the competitive necessity test. Therefore, Panamsat contends, the Bureau should have reached the same conclusion about Transmittal 680 as it did in *Caribnet* – that Comsat's rates were not justified of the basis on competitive necessity.

7. Panamsat also claims that Comsat did not supply sufficient Section 61.38 material. According to Panamsat, this section of the rules requires dominant carriers, such as Comsat, to provide detailed cost support data for proposed tariff changes as well as the underlying data used to develop the rates. Panamsat states that the Bureau should have required Comsat to furnish such data, citing an earlier Comsat proceeding, Communications Satellite Corporation, 2 FCC Rcd 3706 (1987).

8. Panamsat notes that, in denying Panamsat's petition, the Bureau stated that Panamsat had not presented a "compelling argument that the proposed tariff revisions are patently unlawful as to require suspension." *Order*, 3 FCC Rcd at 1884. Panamsat contends that the Bureau improperly placed the burden of proof on Panamsat rather than on Comsat. Also, Panamsat contends that because Comsat is a dominant carrier in the provision of international space segment services, the burden should be on Comsat to provide the justification for its proposed tariffs,

citing International Competitive Carrier Policies, Report and Order, 102 FCC 2d 812, *recon.*, 60 R.R. 2d 1435 (1986) and Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Application at 8-9.

B. ***Comsat Opposition***

9. In its opposition, Comsat denies that it justified the Transmittal 680 rates on the basis of competitive necessity. Rather, Comsat asserts, as demonstrated in the rate development information accompanying the tariff, the rates were fully cost supported. Comsat explains that its filing showed the relationship between the IBS rates and the Intelsat charges for the underlying capacity and the relationship between the rates for the IBS service and other Comsat offerings. Therefore, Comsat maintains, the Bureau correctly concluded that the IBS rates were justified on the basis of Comsat's own costs and not on the basis of competitive necessity. Opposition at 2-3.

10. Comsat also disputes Panamsat's claim that Comsat cannot rely on competitive necessity to justify its rates because most of its competitors are not yet providing service. Comsat maintains that while Panamsat is correct that many of its competitors are not yet operational, Comsat believes that it should not have been compelled to wait until all its competitors are operational before it offered these new rates. Comsat claims that its rates were intended as long-term offerings, designed to be in place as more of its competitors became operational in the next few years. *Id.* at 3-4.

11. Comsat also states that, contrary to Panamsat's contention, Transmittal 680 was clearly different from the Caribnet filing in a number of material aspects. First, the rate reductions proposed therein were smaller than those proposed in the Caribnet filing, according to Comsat. Comsat maintains that the rate reduction proposed in Transmittal 680 was comparatively less than the rate reduction at issue in Caribnet. Moreover, Comsat argues that the Transmittal 680 rate reductions did not target a narrow region but rather rate reductions were designed for broad regional groupings, *i.e.*, Europe/Latin America and Pacific/Africa. Finally, Comsat states that unlike the Caribnet filing, the rate reductions in Transmittal 680 did not rely on or incorporate any route-specific Intelsat discount. *Id.* at 5.

12. Comsat responds to Panamsat's argument that the Bureau should have required Comsat to furnish additional supporting studies and working papers in conjunction with Transmittal 680, by contending that its filing meets the requirements of Section 61.38 of the Rules. Further, Comsat states that the Bureau declined its offer to supply additional information. *Id.* at 5-6.

13. Comsat's final argument is that the Bureau applied the proper standard of review in denying Panamsat's petition to suspend and investigate and that Panamsat provides no valid basis for its argument. Comsat asserts that the Bureau's rationale for its decision in this case is consistent with numerous Bureau Orders denying petitions to reject or suspend and investigate. *Id.* at 6.

C. ***Miscellaneous Pleadings***

14. In response to Comsat's opposition, Panamsat filed a reply to the opposition to the application for review (Panamsat Reply). Panamsat's reply responds to Comsat's statement "that the Commission lacked the authority to grant [Panamsat's] Application for Review, because the time within which the Commission had statutory authority to suspend Comsat's transmittal had ended once the Bureau allowed the transmittal to become effective." Panamsat Reply at 2. Panamsat asserts that Comsat's position is incorrect and that this Commission has the authority to correct or reverse a Bureau decision which it determines was made in error. *Id.* at 3.

15. Comsat then filed a request to strike the reply (Comsat Request) on the basis that it is an unauthorized pleading. Under Comsat's interpretation of Section 1.115(f) of this Commission's Rules, 47 C.F.R. § 1.115(f), a reply to an opposition to an application for review can only be filed at the request of this Commission. Comsat Request at 2.

16. In its opposition to Comsat's request to strike, Panamsat quotes Section 1.115(d) of the Rules, 47 C.F.R. § 1.115(d), which states that "replies to oppositions shall be filed within 10 days after the opposition is filed." Panamsat asserts that this subsection of the rules is inconsistent with Section 1.115(f) which provides that no replies can be filed without Commission permission. Opposition to Request To Strike at 3. According to Panamsat, the administrative history of the rule indicates that only parties who are seeking Commission review of decisions of the Review Board have no automatic right to file replies, citing Practice and Procedure, 36 R.R. 2d 1203, 1216-17 (1976). Therefore, Panamsat concludes that this Commission intended for parties filing applications for review of decisions taken pursuant to delegated authority to file replies as a matter of right.

IV. DISCUSSION

17. We do not believe the Bureau was obliged to initiate a Section 204 investigation of COMSAT Transmittal 680 because it had initiated an investigation of COMSAT's Caribnet filing. We agree with Comsat's claim that Comsat Transmittal 680 differed in a number of respects from Comsat's Caribnet filing. Those differences are sufficient to support a conclusion that an investigation of Transmittal 680 would be much less likely to lead to a conclusion that the changes are unlawful.[6]

18. In designating the proposed Caribnet rates for investigation, the Bureau focused on two aspects of the rates: the amount of the discounts being offered and the targeting of the discounts to the Caribbean area. *Caribnet*, 2 FCC Rcd at 2422. Neither of those aspects was at issue in Transmittal 680. As Comsat correctly asserts in its opposition, Transmittal 680 proposed a lower level of discounts than did the Caribnet filing. Specifically, it reduced the five-year rate to Europe and Latin America in the C-band from $275 to $240 per month. In addition, it reduced the three-year rate from $305 to $275 per month. By contrast, the Caribnet filing had proposed a $200 per month per year rate level for service taken for as short a period as one year.[7]

19. Another major difference between the two tariff filings is that Caribnet was intended to apply only to the Caribbean region while Transmittal 680 was clearly in-

tended for world-wide application. In addition, Comsat states that Transmittal 680 was designed to promote the worldwide use of IBS in the C-band, encourage customers to commit to long-term contracts, and reduce ratemaking disparities among existing rates. Opposition at 4 n.6, citing Comsat's Reply to Panamsat's Petition To Suspend and Investigate at 7. Therefore, we are not compelled to reach the same conclusion as in Caribnet.

20. In these circumstances we agree with the Bureau's conclusion that this tariff does not present questions that warrant investigation at this time. Panamsat's assertion that the Bureau should have obtained more cost support data does not provide any basis for reversing the Bureau's decision to refrain from initiating a Section 204 investigation. We adopted Section 61.38 to obtain information to assist us and our staff in determining whether we should exercise our discretion to initiate a Section 204 investigation. Section 61.38 does not confer any rights upon other parties who might derive some benefit from a Section 204 investigation.[8] If such persons invoke their Section 208 remedies, they may of course use the discovery procedures we have provided in such proceedings. Moreover, we find that Comsat supplied sufficient cost support data to comply with the requirements of Section 61.38.

21. Panamsat's argument that the Bureau used the wrong standard in denying Panamsat's request for a suspension is also incorrect. The Bureau's only error was in stating that no compelling argument had been presented that the proposed tariff revisions are so patently unlawful as to require rejection when, in fact, PanAmSat had filed a petition for suspension. While the Bureau order referred to the wrong type of petition, nonetheless this does not alter our conclusion that PanAmSat did not meet the standard for suspension. To justify suspension, a petitioner must raise significant questions of unlawfulness and also demonstrate that immediate and serious harm is likely to occur if the tariff is not suspended. AT&T Communications, Tariff F.C.C. No. 15, Holiday Rate Plan, FCC 88-299, released Sept. 20, 1988. Moreover, the Bureau's decision to refrain from initiating a Section 204 investigation made the suspension request moot. Section 204(a) confers powers upon this Commission to suspend a tariff pending "a hearing concerning the lawfulness" of the tariff. After considering all of Panamsat's arguments, we affirm the Bureau's decision to deny Panamsat's petition to suspend and investigate.

22. As explained in para. 14, *supra*, Panamsat claims that Comsat made an argument concerning the extent of this Commission's authority to grant Panamsat's application for review. Our review of Comsat's Opposition indicates no such argument and thus there is no basis for Panamsat's contention.

23. Finally, we conclude that Panamsat's reply to Comsat's opposition is an authorized pleading. Section 1.115(d) of the Rules provides that replies to applications for review must be filed within 10 days after the opposition is filed. That section authorizes a reply here. In contrast, the requirement in Section 1.115(f) of the Rules that replies may be filed only upon Commission request "app[lies] only to review of Review Board final decisions." *Amendments to Parts 0 and 1 of the Commission's Rules With Respect to Adjudicatory Re - Regulation Proposals*, 58 FCC 2d 865, 876 (1976). The Commission has recently determined that this is the correct interpretation of Section 1.115(f). *See , Ronald F. Trinchiltela*, 4 FCC Rcd 6360 (1989). While we find that Panamsat's reply is an authorized pleading, this does alter our conclusion that its application for review is without merit.

V. CONCLUSION; ORDERING CLAUSES

24. On the basis of the foregoing discussion, we conclude that the Bureau acted properly in denying Panamsat's petition to suspend and investigate Comsat Transmittal 680. Accordingly, we deny Panamsat's application for review and affirm the Bureau's decision.

25. THEREFORE, IT IS ORDERED that the application for review filed by Pan American Satellite in the above-captioned proceeding IS DENIED.

26. IT IS FURTHER ORDERED that the request to strike Panamsat's reply filed by Communications Satellite Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In addition, Comsat filed a request to strike the reply and Panamsat filed an opposition to the request to strike.

[2] Comsat defines duplex service as "[t]he establishment of communications signals over a satellite channel in two directions, *i.e.*, simultaneous transmission and reception." Comsat Tariff F.C.C. 103, § 2.11.

[3] Comsat describes the C-Band as the frequency band which is used to communicate between an earth terminal and a satellite in which 6 GHz is used to transmit from the earth terminal to the satellite and 4 GHz is used to transmit from the satellite to the earth terminal. K-Band differs from the C-Band in that 14 GHz is used to transmit from the earth terminal to the satellite and 11 or 12 GHz is used to transmit from the satellite to the earth terminal. Comsat Tariff F.C.C. No. 103, § 2.11.

[4] A rollover permits a customer to renew its contract under similar terms and conditions as the existing contract. Under Comsat's general rollover provision, customers are permitted to roll over a contract only if the new contract is for an equal or greater term than the existing contract. The current tariff precludes customers from taking voice grade service pursuant to seven-year contracts to roll them over to IBS service because there is no provision for seven-year contracts. Transmittal No. 680 provides for such a seven-year contract.

[5] Communications Satellite Corporation, CC Docket No. 87-111, Memorandum Opinion and Order, 2 FCC Rcd 2420 (1987) (*Caribnet*). Comsat withdrew the tariff before the investigation was completed. *See* Communications Satellite Corporation, CC Docket No. 87-111, 2 FCC Rcd 2430 (1987).

[6] We did not determine that the Caribnet changes were unlawful. The question became moot before the investigation was concluded. We do not, of course, determine whether the Transmittal 680 changes were unlawful. We merely affirm the Bureau's decision to refrain from investigating that question because there was not sufficient indication that the tariff revi-

sions were unlawful. PanAmSat may, of course, invoke its Section 208 remedies to challenge the lawfulness of this tariff if it chooses to do so.

[7] According to Comsat, the three-year rate in Transmittal 680 is the one closest to the one-year rate offered in Caribnet. Panamsat does not challenge this assertion.

[8] Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating to Evidence, 25 FCC 2d 957, 961, 965 (1970); Amendment of Parts 1 and 61 of the Commission's Rules, Report and Order, CC Docket No. 83-992, 98 FCC 2d 855, 861 (1984).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 89-210
37715

In the Matter of	)	
	)	
Revision of Part 15 of the Rules	)	
regarding the operation of radio	)	GEN Docket No. 87-389
frequency devices without an	)	
individual license.	)	

ORDER DENYING PETITIONS FOR STAY

Adopted: June 16, 1989 ; Released: June 19, 1989

By the Commission:

Introduction

1. On March 30, 1989, the Commission adopted a First Report and Order (Order) in the above entitled proceeding. [1] That Order revised and updated Part 15 of the regulations governing the non-licensed operation of radio frequency (RF) devices. The Commission removed many device-specific regulations, permitted additional bands of operation, and established uniform technical standards. In some cases, the Commission changed technical standards to reduce the potential of some Part 15 devices to cause interference to the authorized radio services. [2]

2. The Commission has received three petitions requesting that we stay all or part of the new Part 15 rules. The petitions were filed by the Linear Corporation (Linear), a manufacturer of control and security alarm

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1 See, First Report and Order, Gen. Docket No. 87-389, 54 Fed. Reg. 17710, April 25, 1989.

2 The authorized radio services consist of radio operations conducted under all Parts of the Commission's regulations other than Part 15. In accordance with Section 15.3 of the former rules and Section 15.5 of the rules adopted in the Order, Part 15 devices operate on a sufferance basis. Part 15 devices must accept whatever level of interference is received from any other radio frequency device. Further, the operator of the Part 15 device must correct any harmful interference that is caused. See, 47 CFR Section 15.5, as adopted in the Order.

devices, Sensormatic Electronics Corporation (Sensormatic), a manufacturer of anti-shoplifting devices, and the American Radio Relay League (the League), on behalf of amateur radio licensees.

3. In order for us to act favorably on a petition for stay, petitioners must satisfy the four criteria established for stay of an administrative action. [3] These criteria are as follows: (1) has the petitioner made a strong showing that it is likely to prevail on the merits of the appeal? (2) has the petitioner shown that without such relief, it will be irreparably injured? (3) would the issuance of a stay substantially harm other parties interested in the preceeding? and, (4) where lies the public interest?

Discussion

4. Linear requests a partial stay of Section 15.33 [4] insofar as it requires the testing of emissions from transmitters at frequencies above 2 GHz. It asks that the stay be effective until six months following the effective date of the adoption of new measurement procedures. [5] In support of the stay, Linear states that a demonstration of compliance above 2 GHz is meaningless absent the establishment of measurement procedures and measurement site calibration requirements for that frequency range. [6] Linear adds that without these procedures and site calibration standards, it would be unsure as to what measurement procedures are acceptable to the

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3 See, Virginia Petroleum Jobbers Association v. FPC, 259 F. 2d 921 (D. C. Cir. 1958); see also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D. C. Cir. 1977).

4 The rule sections cited in this Memorandum, Opinion and Order (MO&O) reflect those adopted in the Order. This rule section requires transmitters to demonstrate compliance with the standards up to at least the tenth harmonic of the highest fundamental frequency.

5 As stated in paragraph 102 of the Order, the Commission intends to initiate rule making on each of its measurement procedures. Such rule making would codify the measurement procedures while allowing them to be updated and clarified in response to public comments.

6 The measurement procedure currently employed for the type of equipment manufactured by Linear is FCC/OST MP-1 (February 1983), "FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers." Measurement site calibration requirements are contained in Bulletin OET 55, "Characteristics of Open Field Test Sites," August 1982.

Commission and could be delayed indefinitely in obtaining Commission acceptance of measurement results above 2 GHz. Linear contends that this would cause irreparable harm because of possible loss of market share and because Linear is not provided with any protection against "...arbitrary and capricious consideration of its applications..." by the Commission.

5. Initially, we note that the existing measurement procedure for control and security alarm devices, MP-1, may be used for measurements above 2 GHz and describes the required measurement equipment in sufficient detail. Moreover, five days prior to Linear's filing of their Petition for Stay, the Commission adopted a proposed new measurement procedure for control and security alarm devices (Notice of Proposed Rule Making, Gen. Docket No. 89-117, adopted May 12, 1989). Linear, and other interested parties, will have the opportunity to comment in that proceeding. In the interim, Section 15.29(d) of the rules provides that we will perform equipment sampling using procedures in effect at the time the equipment was authorized. Finally, it should be noted that all manufacturers are in the same position. Thus, Linear will not suffer a loss of market share as a result of the new rules, and the use of existing procedures will not result in the "...arbitrary and capricious consideration..." of any application.

6. For these reasons it does not appear that Linear will prevail on the merits, and clearly, it will not suffer irreparable harm. On the other hand, to stay application of Section 15.33 would delay unnecessarily our efforts to lower spectrum noise levels to the detriment of the authorized radio services. It appears then that the public interest would not be served by granting Linear's petition for stay.

7. Sensormatic requests a stay of the new regulations that allow Part 15 transmitters to be operated in the frequency band 902-905 MHz. It requests that this stay be effective until the Commission has acted on its Petition for Reconsideration in this proceeding. Sensormatic produces Part 15 field disturbance sensors, operating in the 902-928 MHz band, used to prevent shoplifting. Sensormatic states that without a stay, interference to its systems could occur due to the proximity of other retail outlets that may be demonstrating and operating new Part 15 devices in the same band. Sensormatic states that it will incur irreparable harm unless the requested stay is granted because the potential interference from the new Part 15 devices will disable much of its anti-shoplifting equipment. [7]

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7 While Sensormatic's equipment does not currently operate in the band 902-905 MHz, it indicated that preserving this portion of the 902-928 MHz band will allow it to re-tune most of their installed bases to operate within this range.

8. Part 15 devices are subject to the risk of interference from other Part 15 devices as well as devices operating in the authorized services. In this regard, we note that Sensormatic will have to take steps to protect is systems from increased use of the 902-928 MHz band by operators in the Amateur Radio Service (ARS) under Part 97 of our rules, and of spread spectrum devices operating under Part 15 of our rules. We continue to believe that the public interest would best be served by maintaining our long-standing policy that particular Part 15 devices are not entitled to special interference protection.

9. We recognize, however, that there are thousands of installed anti-theft systems in operation today that could be susceptible to interference under the rule changes we adopted. According to Sensormatic, these systems protect billions of dollars of merchandise at any given time, and have reduced retail store shoplifting losses from 50 to 80 percent. We are concerned that the interests of retailers and consumers would not be served if installed systems failed to operate effectively because of our rules changes, and significant increases in the incidence of retail theft resulted. Thus, if it is demonstrated on reconsideration that our rule changes are the primary cause of significant problems in the operation of these installed systems that will create major losses for retailers and consumers, we will take steps to alleviate this harm. [8]

10. Although we note that some relief may be justified on reconsideration, we do not believe that Sensormatic has demonstrated that irreparable harm will occur during the brief period before we issue a reconsideration ruling. It is not reasonable to expect a proliferation of new Part 15 devices in 902-928 MHz band immediately upon the effective date of the new rules; manufacturers will take some time to develop and market devices that utilize these newly-available frequencies. Reconsideration of these issues will be handled on an expedited schedule to ensure that any effect on manufacturers and consumers of Part 15 devices will be minimal. We thus conclude that neither Sensormatic nor the retailers and consumers that use these anti-shoplifting systems will be irreparably harmed during the pendency of the reconsideration proceeding. We accordingly deny Sensormatic's request for a stay of our rules.

11. The League requests a stay of the effective date of all rule changes in the Order. It requests that the stay remain effective pending

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8 For example, we might find appropriate a reasonable transition period during which the new Part 15 emission limits would not be allowed in the 902-905 MHz band. We emphasize that any companies planning to develop new Part 15 devices utilizing these three MHz are, of course, on notice that the new rules are subject to reconsideration.

the prosecution of all administrative and judicial appeals in this proceeding. The League argues that the general radiated limits for Part 15 devices are too high. It warns against the co-location of Part 15 devices and ARS stations in residential areas in the same frequency bands. It argues that, to the extent the Order permits Part 15 operations in bands allocated for ARS use, interference will be caused and amateurs will be irreparably harmed. In this regard, the League references a model, submitted with its Petition for Reconsideration in this proceeding, purporting to show that significant interference will be caused to amateurs from Part 15 operation in various bands.

12. The League's request that the Commission stay application of the entire newly adopted Part 15 is not warranted and not supported. Many of the changes in Part 15 either do not affect amateur operations or would actually reduce the potential that interference would be caused to amateurs. Thus, we will limit consideration of the League's Petition for Stay to those provisions of Part 15 that could allow higher emission levels or encourage a greater number of Part 15 devices in the amateur bands. Those rules fall into three groups: 1) the adoption of general emission limits between 1.705 and 30 MHz; 2) the adoption of general emission limits between 30 and 900 MHz; and, 3) the adoption, in 47 CFR Section 15.249, of new general bands [9] in which emission levels higher than the general limits would be permitted.

13. With respect to the first group, the League relies upon its revised propagation model to demonstrate that interference could occur at distances ranging from 41 to 1750 meters. In the 1.705-30 MHz band the following emission limits were applied under the former regulations: a maximum average field strength of 100 uV/m at 30 meters was permitted between 1.705 and 10 MHz; and, a maximum average field strength of 10 uV/m at 30 meters was permitted between 10 and 30 MHz. [10] Under the new regulations, emission limits in the band 1.705-30 MHz are as follows: a maximum average field strength of 100 uV/m at 30 meters, with peak emissions not to exceed 1000 uV/m at 30 meters, is permitted between 1.705 and 10 MHz; and, a maximum CISPR quasi-peak field strength of 30 uV/m at 30 meters is permitted between 10 MHz and 30 MHz. [11] Thus, the only change in emission limits between 1.705 and 10 MHz has been to reduce interference potential by placing a limit on peak emissions. Between 10 MHz and 30 MHz, because of

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9 These new bands are 902-928 MHz, 2400-2483.5 MHz, 5725-5875 MHz, and 24.0-24.25 GHz.

10 See, 47 CFR Section 15.114 of the former regulations.

11 See, 47 CFR Sections 15.209 and 15.223.

the change in measurement technique from average to quasi-peak, the new limit is not substantially, if at all, higher than under the former rules. Indeed, depending on the form of modulation used, emissions limits in this band may be considerably less. Under these circumstances, it seems unnecessary to explore the predictive virtues of the League's new interference model. The new rules amount to little more than a recodification of the former standards. A stay of the regulations is not warranted.

14. Between 30 and 900 MHz, the general limits in 47 CFR Section 15.209 were based on the signal levels needed to prevent interference to the authorized services at a separation distance of 10 meters with 8 dB of attenuation provided by intervening objects. In its calculations, the League assumed no attenuation due to intervening objects and assumed average emission limits instead of the quasi-peak limits adopted in the rules. Predictions of interference based on these assumptions are not persuasive.

15. In the new general purpose bands above 900 MHz, where higher emissions are permitted, the League's model again assumed no attenuation of radiated signals from intervening objects. While a smooth earth can be assumed in calculating signal strengths at relatively short distances in an open field, such calculations are not representative of what would occur in practice. In an urban environment, of course, there is a high probability that there will be intervening objects between a Part 15 device and an amateur receiver. In a rural environment there is likely to be a greater separation between the devices.

16. Although we appreciate the League's fears of increased interference in the bands discussed above, they are unfounded. For instance, we are unaware of any interference to amateur operations from Part 15 transmitters in the 1.705-30 MHz band. The large numbers of licensed users of these bands effectively preclude the general operation of Part 15 devices. Only those devices used in relatively shielded areas can be used at the Part 15 emission limits. It is not likely that this situation will change. Similarly, within the band 30-900 MHz, the low emission levels permitted for Part 15 transmitters effectively preclude the operation of these devices except in relatively shielded areas or on vacant bands. Thus, the potential for Part 15 transmitters to cause interference to amateur operators is self-limiting. It is noted that the League references various comments from individual amateurs concerning interference. These comments generally identify three sources of interference: TV receivers, incidental radiators, and computers. To the extent that TV receivers have caused any difficulties in the past, it should be noted that emission limits for TV and other receivers have been tightened. Incidental radiators have not been the subject of our technical standards, nor were such standards proposed in this proceeding. The number of references to computers were so few that we are led to believe such incidences of interference were caused by non-compliant or co-located computing devices. Finally, while there are not many types of

Part 15 devices operating above 900 MHz, thousands of Part 15 field disturbance sensors have been operating above 900 MHz on frequencies allocated to the ARS for a number of years at significantly higher emission levels than permitted under the new rules. Based on the League's calculations, widespread interference to amateurs should be expected. In fact, interference from these devices does not appear to be a problem.

17. The League has not persuaded us that it is likely to prevail on the merits of this proceeding. Its projections of potential interference appear unrealistic. Nor do we believe amateur licensees will suffer irreparable harm in the interim. We are persuaded that the public interest would be best served by proceeding with the new rules adopted in this docket.

18. Based on the above, we find that the petitions for stay from Linear, Sensormatic and the League should be denied. We have been given no persuasive reason to cause us to delay the effectiveness of the new Part 15 regulations. Indeed, we believe that we have been faithful to our goal of continuing to protect the licensed services while encouraging the development of new and better Part 15 devices. We will continue to review the matters raised by the petitioners in the context of their requests for reconsiderations of actions in this proceeding.

19. Pursuant to the authority contained in Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, and Section 1.45(e) of the Commission's Rules, IT IS ORDERED that the Petition for Stay filed by Linear Corporation, the Motion for Partial Stay filed by Sensormatic Electronics Corporation, and the Motion for Stay filed by the American Radio Relay League ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 89-247
37735

In the Matter of	)	
	)	
Application for Approval of Merger	)	File No. ENF-89-06
of Hughes Industries, Inc. into	)	
South Central Bell Telephone Company	)	
and for Approval of Merger of Hughes	)	
Telephone Company, Inc. into South	)	
Central Bell Telephone Company	)	

MEMORANDUM OPINION AND ORDER

Adopted July 26, 1989 ; Released July 28, 1989

By the Commission:

1. Before the Commission is an application filed by South Central Bell Telephone Company ("South Central Bell") pursuant to Section 221(a) of the Communications Act of 1934 ("the Act"), requesting approval to acquire Hughes Industries, Inc., ("HI") and Hughes Telephone Company, Inc. ("Hughes") by way of merger.[1] For the reasons discussed herein, we conclude that the proposed merger will benefit the customers currently served by Hughes and is otherwise in the public interest. Accordingly, we grant the application.

I. Background

2. The application recites that South Central Bell is a corporation organized and existing under the laws of the State of Georgia, and is a duly authorized and certificated common carrier as such term is defined in 47

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1 The Application was filed February 16, 1989 and appeared on Public Notice, DA 89-324, released March 23, 1989, which solicited public comments which were due by April 24, 1989. No comments were received in response thereto. Thereafter, counsel for the Mississippi Public Service Commission ("PSC") orally confirmed that Mississippi had no objections to the proposed acquisition. Further, Mississippi law requires South Central Bell, HI and Hughes to file an application to secure the consent of the PSC to the proposed merger. The PSC issued its order granting such consent on April 4, 1989. See Order, Docket U-5313 (April 4, 1989) ("PSC Order").

U.S.C. § 153(h). South Central Bell is a wholly-owned subsidiary of BellSouth Corporation. HI is a holding company organized and existing under the laws of Mississippi, and is the owner, inter alia, of all the issued and outstanding stock of Hughes. Hughes is a Mississippi corporation engaged in providing telecommunications service in certain areas of Lauderdale, Newton, Noxubee, Neshoba, and Kemper counties, Mississippi. As recited in the Application, Hughes is a connecting carrier as such is defined pursuant to 47 U.S.C. §§ 152 and 153.[2]

3. The owners of HI desire to dispose of their various interests in that corporation, including Hughes, and thereby discontinue their operation of telephone business in Mississippi. Pursuant to an "Agreement and Plan of Merger By and Among BellSouth Corporation, South Central Bell Telephone Company, Hughes Industries, Inc., Hughes Telephone Company, Inc. and The Shareholders of Hughes Industries, Inc.", dated January 27, 1989 (referred to as the Merger Agreement), the owners of HI propose to merge their company into South Central Bell after the disposition of non-telephone assets. South Central Bell will be the sole surviving corporation. All of the issued and outstanding shares of common stock of HI will be converted into and exchanged for shares of common stock in BellSouth or, in part, for cash payment, and HI will cease to exist. The purchase price is subject to being adjusted to reflect any deviation from certain assumptions made by the parties in the Merger Agreement, and such price adjustment is to be verified by an audit conducted by independent certified public accountants following the conclusion of the merger.

4. Further, all of the common stock of Hughes owned by HI will be transferred to South Central Bell which will become the owner of 100 percent of the issued and outstanding common capital stock of Hughes. South Central Bell will not acquire the common stock or assets of any other subsidiary of HI; any and all such subsidiaries will be spun-off or otherwise disposed of by HI prior to the merger of HI into South Central Bell. The Application recites that the total acquisition cost of Hughes is approximately $19,800,000.00.

5. After the merger of HI into South Central Bell, Hughes will operate as a wholly-owned subsidiary of South Central Bell. Within a reasonable time following the merger of HI into South Central Bell, Hughes will be merged into South Central Bell, and Hughes will cease to exist as a separate entity. Thereafter, South Central Bell will become the owner of the telephone property and business currently owned by Hughes, and the operations currently conducted by Hughes will be conducted by South Central Bell. In sum, the proposed transfer of ownership of HI to South Central Bell

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2 Application, at 2.

will result in a transfer of the total interest in Hughes to South Central Bell.

II. Discussion

6. Section 221(a) of the Act provides, inter alia, for certification for acquisitions of local exchange telephone companies or their assets where the Commission finds such acquisitions to be in the public interest. 47 U.S.C. § 221(a). Certification, in turn, provides for immunity against acts of Congress which might, in the absence of such certification, hold the acquisition unlawful, for example, the antitrust laws. See In the Matter of Wisconsin Telephone Co., 27 FCC 1, 18 (1959).

7. We note that no comments have been received opposing the proposed acquisition, although this fact, of course, does not relieve us of the necessity of undertaking the required statutory analysis. The Commission's policy has long been that "... where the need of the public for efficient and economical service has been demonstrated, pursuant to Section 221(a), the general public policy against the fostering of monopolies is not an impediment to [an acquisition] ... in the absence of any other significant public interest considerations. Otherwise, Section 221(a) would be of little or no practical utility." Southwestern Bell Telephone Co., 1 FCC 2d 1420, 1438 (1965) (citations omitted).

8. South Central Bell asserts that there are numerous public benefits which would result from the proposed merger. These asserted benefits include: improvement in local exchange service to current Hughes customers due to rapid deployment of repair and maintenance services which are often provided on an automated basis; marketing of custom calling features such as touch-tone, three-way calling, call forwarding and call waiting; upgrading of outside plant facilities; provision of Open Network Architecture; equal access and improved maintenance of toll facilities; improved Private Line services; provision of area calling plans; and the general efficiencies which will result from the integration of Hughes with other South Central Bell operations.[3] Based on these assertions, we conclude that current Hughes subscribers would receive clear benefits from the merger.

9. In addition to these benefits we note the expansion of South Central Bell's customer base as a result of the proposed merger and the fact that this expansion benefits a monopoly carrier. In this regard, we have found that the addition of subscribers by an acquiring monopoly local exchange carrier (LEC) to its customer base is not antithetical, per se, either to antitrust policies or to other Commission policies. See Pacific Northwest

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3 Application, at 10-13.

Bell Telephone Company, File No. ENF-85-52, Memorandum Opinion and Order, Mimeo 4042 (released May 2, 1986), recon. denied 2 FCC Rcd 2019 (1987). In the case before us, South Central Bell will acquire some 5,100 subscribers as a result of the proposed acquisition, over 4,000 of which are single party residential subscribers, plus 24 public and semi-public pay stations. South Central Bell currently provides services over more than seven million residential and business subscriber access lines.[4] Considering the comparatively small increase to South Central Bell's subscriber base resulting from the proposed acquisition, along with the predictable public benefits recited above, we conclude that the proposed transaction satisfies the public interest standard of Section 221(a) and that certification should be granted.

10. In reaching our decision, we take note of the fact that the record before us indicates a possibility that the public in the affected exchanges may eventually pay higher local rates than at present. However, any such higher rates will be offered pursuant to tariffs which are filed subject to the approval of the Mississippi PSC which, as recited above, already has granted its approval for the acquisition of Hughes by South Central Bell. The Mississippi PSC retains ongoing jurisdiction to ensure just and reasonable local exchange service rates.[5]

III. Conclusion

11. The record before us indicates that the proposed merger will benefit the public in the affected exchanges and will otherwise promote the public interest pursuant to the public interest standard set out in 47 U.S.C. § 221(a). Therefore, we conclude the instant application should be granted.

IV. ORDERING CLAUSES

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4 See South Central Bell Telephone Company, Annual Report Form M, Year Ended December 31, 1988, Schedule S-3, (filed July 14, 1989). In Mississippi alone, South Central Bell provides service via more than 950,000 switched and special access lines to residential and business subscribers.

5 Additionally, we note that although the possibility of higher rates was at issue in the application filed before the Mississippi PSC, no comments were received in that proceeding opposing the merger. PSC Order, paras. 2 and 10.

12. Accordingly, pursuant to Section 221(a) of the Communications Act, 47 U.S.C. § 221(a), IT IS ORDERED that, in view of the foregoing and upon consideration of the entire record of this proceeding, we HEREBY CERTIFY that South Central Bell's acquisition of the assets and others holdings of Hughes and Hughes Industries, Inc., will be of advantage to the persons to whom service is to be rendered and is otherwise in the public interest.

13. IT IS FURTHER ORDERED that the Application of South Central Bell Telephone Company to acquire the communications assets and other property of Hughes Telephone Company in Bailey, Mississippi, IS GRANTED.

14. This Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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